No. 210
Brief of Petitioner.
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Supreme Court of the United States

Filed Feb. 17, 1899.

THE GREAT SOUTHERN FIRE-PROOF HOTEL COMPANY, *Petitioner*,

vs.

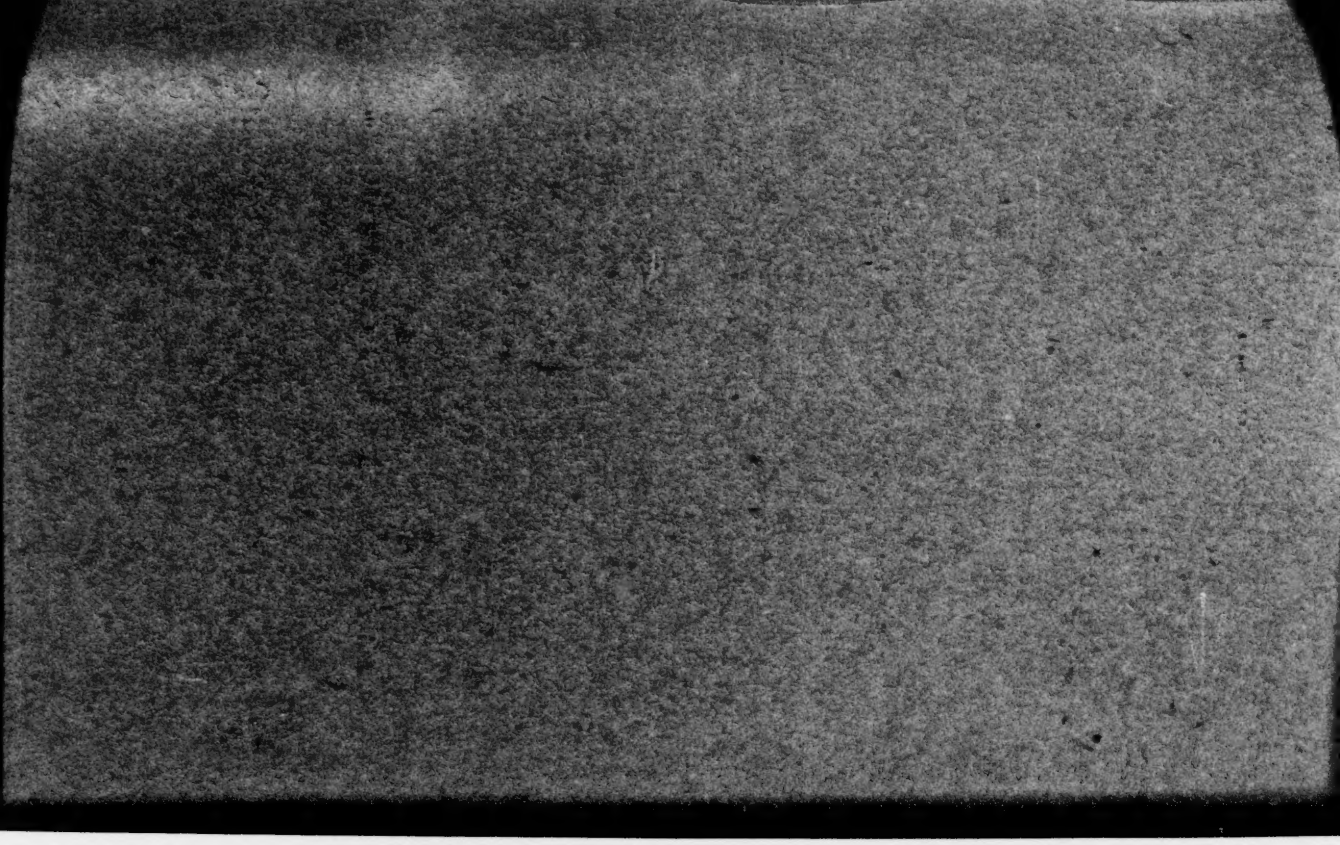
BENJAMIN F. JONES, GEORGE M. LAUGHLINS, HARRY A. LAUGHLINS, Jr., BENJAMIN F. JONES, Jr., DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF JONES & LAUGHLINS, LIMITED, AND OTHERS, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR THE PETITIONER.

D. F. PUGH AND
J. E. SATER,
Attorneys for Petitioners.

COLUMBUS:
PRESS OF STAHL & GLEIM,
1899.



Supreme Court of the United States

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vs.

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BRIEF FOR THE PETITIONER.

The petitioner's prayer is for a writ of *certiorari* to the United States Court of Appeals for the Sixth Circuit.

Its petition is filed in pursuance of Section 6 of the Judiciary Act of March 3d, 1891.

By its petition, the petitioner also asks this Court to review and reverse an interlocutory order or decree of the Circuit Court of Appeals of the Sixth Circuit.

A certified copy of the record, including therein all the proceedings in the United States Court of Appeals of the Sixth Circuit in this case, accompanies the petition.

The only question, or questions, which counsel for the petitioner conceive can arise now, at this stage of the case, are: Is the petition for the writ of *certiorari* premature? Does the case present a question of "peculiar gravity," or of "general importance," or of "uniformity of decision?"

This Court has, in several cases, decided when, and for what reason, it may issue a writ of *certiorari*.

(1) It may be done in a case which is pending in the said Court of Appeals.

(2) The case must belong to those classes of cases in which the decision of the Court of Appeals is declared a finality.

(3) It must be a case in which a question of "peculiar gravity," or of "general importance," or of "uniformity of decision" is involved.

In the case of *Forsyth* v. *City of Hammond*, 166 U. S., 506, 514, is the last statement of the rule announced by this Court. The opinion declares: "We reaffirm in this case the propositions heretofore announced, to-wit: that the power of this Court in *certiorari* extends to every case pending in the Circuit Court of Appeals, and may be exercised at any time during such pendency, provided, the case is one which, but for this provision of the statute, would be finally determined in that Court. And, further, that while this power is co-extensive, with all possible necessities and sufficient to secure to this Court a final control over the litigation in all the Courts of Appeal, it is a power which will be sparingly exercised, *and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding a conflict between two or more Courts of Appeal, or between Courts of Appeal and the Courts of a State,* * * * *demands such exercise.*"

Again, in *American Construction Company* v. *Jacksonville, I. & K. W. R'y Co.*, 148 U. S., 372, 383, the resolution of this Court was, that the power to issue the writ of *certiorari* would be exercised "only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."

In *Cunard Steamship Co.* v. *Fabre*, 13 Sup. Ct. Rep., 1045, the writ was issued because one of the three Circuit Judges composing the Court of Appeals, dissented from the decree which reversed a decree of the District Judge.

In *Forsyth* v. *Hammond*, before cited, the controversy in the State Court was about the annexation of a few hundred acres of land to the city of Hammond, Indiana. The lower Court of that State, upon the verdict of a jury, decreed that the land should be annexed to the city of Hammond. Part of the land thus annexed belonged to Mrs. Forsyth. The city levied taxes to the amount of $3,500.00 on her land. She filed a bill in equity in the Circuit Court of the United States for the District of Indiana, praying for an injunction restraining the collection of the taxes. That Court refused to award the injunction and dismissed her bill. She appealed to the United States Circuit Court of Appeals. That Court reversed the decision of the Circuit Court and remanded the case to that Court for further proceedings.

Before Mrs. Forsyth filed her bill in the United States Court she, and the owners of the rest of the annexed land, appealed from the judgment of the lower State Court to the Supreme Court of Indiana. That Court affirmed the decision of the lower Court, and this Court's decision was rendered before the decisions of either of the United States Courts was announced.

In both of these cases, in the one prosecuted in the United States, and in the one prosecuted in the State Courts, the sole issue was as to the validity of the annexation proceedings. The decision of the State Courts and of the United States Circuit Court was that the proceedings were valid; the decision in the United States Court of Appeals was that they were invalid. There was a categorical contradiction between the decisions of the United States Circuit Court and the Supreme Court of Indiana, on the one side, and the decision of the United State Circuit Court of Appeals on the other side.

The pertinency of a quotation from the opinion in *Forsyth* v. *Hammond*, *supra*, page 515, disclosing the reasons for issuing the writ of *certiorari*, is obvious. Justice BREWER said:

> "Among the considerations thus suggested are those which indicate why, in this case, the Court properly exercised its power and issued the writ of *certiorari*. There was a conflict between the decision of the Circuit Court of Appeals for the Seventh Circuit, and the Supreme Court of Indiana. The latter Court had declared that the proceedings by which the contiguous territory was annexed to the city of Hammond were legal, and therefore that that territory was to be considered by all the officers of the State of Indiana as within the territorial limits of the city. The United States Circuit Court of Appeals, by its decision in this case had declared that such annexation proceedings were invalid, and that the property of this petitioner was not within the city limits. * * * All the unfortunate possibilities of conflict and collision which might arise from these adverse decisions were suggested when this application for *certiorari* was made, and, although no final decree had

been entered, it seemed to us a duty to bring the case and the question here for examination at the earliest possible moment."

The parallel between this case, and the case at bar is perfect. There is no distinction whatever between the relevant master facts of the two cases.

In the case at bar the decision of the Supreme Court of Ohio was that the mechanic's lien law referred to in the petitioner's petition was unconstitutional; and the decision of the United States Circuit Court was exactly in accord with that decision. The decision of the United States Circuit Court of Appeals was in positive conflict with those decisions. The decision of the Supreme Court of the State was rendered before the decisions of either of the United States Courts was rendered.

The only distinction between the two cases is, that in the case at bar the plaintiffs and the cross-petitioner were not parties to the case in which the Supreme Court of the State pronounced the mechanic's lien law unconstitutional. But that distinction does not affect the parallel between them on principle and reason.

It is respectfully submitted, borrowing from the opinion of Justice BREWER, that the "unfortunate possibilities of conflict and collision which might arise from these adverse decisions," are enough to entitle this petitioner to have the case removed to this Court for examination, and are a sufficient reason why this Court should issue a writ of *certiorari* in this case.

It will probably be claimed that the matter involved in these suits is exclusively one of private interest. But that is not the true interpretation of these cases. The fact that

there is a conflict between the decision of the Supreme Court of the State of Ohio, and the decision of the United States Circuit Court, on the one side, and the decision of the Circuit Court of Appeals, on the other side, renders the matter involved one of public interest. The fact that there are only these two cases now pending in which this collision of decisions has occurred, does not prove that there may not be other cases in which the same conflict may arise. It is possible that there yet may be other cases. This Court has a right, probably it is its duty, to consider this possibility.

The conflict which exists between these decisions, as shown by the record, makes the question involved one of gravity and importance—just such a question as has heretofore persuaded, and ought now to persuade, this Court to issue a writ of *certiorari*.

In *Forsyth* v. *The City of Hammond*, which we have cited, there was just as much reason for the contention that the matter involved was only of private interest, as there is in these cases. The Court said that by the decision of the Circuit Court of Appeals there "would be a tract of a few hundred acres of land within the exterior boundaries of the city of Hammond * * * withdrawn from the city's jurisdiction, and in fact excepted from its territorial limits." On the other hand, the Court said, the Supreme Court of Indiana had declared that this tract of land *was* within the city's jurisdiction and territorial limits. Now, nobody was interested in this matter except the owner of the tract of land, on the one side, and the city of Hammond, a municipal corporation, on the other side.

The controversy did not involve the whole State of Indiana; it did not involve the whole population of the State

of Indiana. It did not even interest the whole population of one county.

We again insist that the necessity of avoiding a conflict between the Circuit Court of Appeals and the Supreme Court of the State, is a matter of public interest, and not of private interest; and that this is an answer to any criticism that may be made that these cases only involve a matter of private interest.

We assume that a discussion of the merits of the controversy in the case and of the decision of the Circuit Court of Appeals would not be relevant to the brief on this application for a writ of *certiorari*, and although the opinions of the Circuit Court and Circuit Court of Appeals are contained in the record, we have refrained from a discussion of these matters.

Respectfully submitted,

D. F. PUGH AND
J. E. SATER,
T. K. Richards
Attorneys for Petitioners.

No. 210.

Brief of Pugh for Petitioner.

No. 17,884.

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Supreme Court of the United States.

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OCTOBER TERM, 1899.

No. 210.

THE GREAT SOUTHERN FIRE-PROOF HOTEL COMPANY, *Petitioner*,

vs.

BENJAMIN F. JONES ET AL., AND SOSMAN AND LANDIS.

On Writ of Certiorari to the United States Circuit Court of Appeals, for the Sixth Circuit.

Argument in behalf of The Great Southern Fire-Proof Hotel Company.

J. E. SATER, AND
D. F. PUGH,
Attorneys for Petitioner.

COLUMBUS:
PRESS OF SPAHR & GLENN,
1900.

No. 17,296.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 210.

THE GREAT SOUTHERN FIRE-PROOF HOTEL COMPANY, *Petitioner*,

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Argument in behalf of The Great Southern Fire-Proof Hotel Company.

STATEMENT.

The question presented to the Court in this cause is the constitutionality of the Mechanics' Lien Law of Ohio, passed on April 13, 1894. The law is found in Vol. 91, Ohio Laws, pages 135, 137, or in sections 3184, 3185 and 3185*a* of the Revised Statutes of Ohio, Gianque's, Bates', or Smith and Benedict's Edition. The Supreme Court of Ohio and the Circuit Court, Southern District of Ohio, Eastern Division, both held the law unconstitutional. The Circuit Court of Appeals, Sixth Circuit, held to the contrary. There is thus not only a conflict of opinion between the State and the Federal Courts, but the Federal Courts themselves are not in harmony.

Conflict of opinion.

or any other well, or upon such oil derrick, oil tank, oil or gas pipe line, and upon the material and machinery so furnished, and upon the interest, lease-hold or otherwise, of the owner in the lot or land on which the same may stand, or to which it may be removed."

"Sec. 3185. Such person in order to obtain such lien, shall, within four months of the time from performing such labor, or furnishing such machinery or material, file with the recorder of the county where the labor was performed, or the machinery or material furnished, an affidavit containing an itemized statement of the amount and value of such labor, machinery, or material, and a description of any promissory note or notes given for such labor, machinery, or material, or any part thereof, with all credits and offsets thereon, a copy of the contract, if it is in writing, a statement of the amount and times of payment to be made thereunder, and a description of the land on which the gas well, oil well, or other wells are situated, or the land on which the house, mill, manufactory, or other buildings, or appurtenance, fixture, bridge, or other structure may stand, or to which it may be removed; and the same shall be recorded in a separate book to be kept therefor, and shall operate as a lien from the date of the first item of the labor performed, or the machinery or material furnished upon or toward the property designated in the preceding section, and the interest of the owner in the lot or land on which the same may stand, or to which it may be removed, for six years from and after the date of the filing of such attested statement. If an action be brought to enforce such lien within that time the same shall continue in force until the final adjudication thereof; and there shall be no homestead or other exemption against any lien under the provisions of this chapter."

"Sec. 3185*a*. In all cases where the labor, material or machinery referred to in sections 3184 and 3185, shall be furnished by any person other than the original contractor, with such owner or his agent or trustee, the lien shall not exceed the actual value of the labor, material or machinery so furnished, and the aggregate amount of liens for which the property may be held shall not, in the absence of fraud or collusion between

> the owner and original contractor, exceed the amount of the price agreed upon between the owner and original contractor for the performing of such labor and the furnishing of such material and machinery. Provided, if it shall be made to appear that the owner and contractor, for the purpose of defrauding subcontractors, material-men or laborers, fixed an unreasonably low price in the original contract for any work or material for which a lien is given under section thirty-one hundred and eighty-four, the court shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and such subcontractors, material-men and laborers shall have a lien to the amount of such fair and reasonable price so ascertained."

The law seeks to give a direct and independent, and not a derivative, lien in favor of the subcontractor, laborer and material-man on the owner's property. The filing of an affidavit with the recorder of the county, if the law be valid, gives an absolute lien in favor of the claimant, up to the full amount of the owner's original contract price, regardless of the state of accounts between him and his original contractor. Thus the owner may contract for a given price but may be compelled to pay twice as much, and to persons with whom he has no privity of contract and who are to him strangers.

The law direct and derivative

As hereinafter fully shown in a history of the mechanics' lien law of Ohio, the Courts of that State, and until 1894, the legislature also, uniformly refused to recognize other than a derivative lien. It has been and is still the settled rule in Ohio, that the subcontractor's rights are limited and measured by the terms of the contract between the property owner and original contractor.

THE ERRORS ASSIGNED.

In behalf of the Hotel Company we claim that the Circuit Court of Appeals erred in holding the mechanics' lien law constitutional, for the following reasons:

1. It contravenes sections 1 and 2 of the Bill of Rights (Art. 1, Constitution of Ohio), which sections are as follows:

"Sec. 1. All men are, by nature, free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.

"Sec. 2. All political power is inherent in the people. Government is instituted for their equal protection and benefit," etc.

2. It is in conflict with that part of Sec. 28, Art. 2, of the Constitution of Ohio, which provides that "The General Assembly shall have no power to pass retroactive laws or laws impairing the obligation of contracts;" also with Sec. 10, Art. I, Constitution of the United States, which contains a similar provision.

3. It is in conflict with Sec. 1, Art. XIV, of the Constitution of the United States, which recites: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. The law having been declared unconstitutional by the Supreme Court of Ohio, the decision of that Court is controlling and should have been followed by the Circuit Court of Appeals.

Our contention is that,

(*a*) The above mentioned mechanics' lien law denies to the owner of real estate the right of acquiring, possessing and protecting property, and the right of contract in relation thereto—of making and enforcing contracts, of fixing and limiting the consideration therefor, and the manner and time of payment.

(*b*) It impairs the obligation of contracts.

(*c*) It deprives the owner of his property without due process of law.

(*d*) It is obnoxious class legislation.

(*e*) The decision of the Supreme Court of Ohio is controlling.

ARGUMENT.

HISTORY OF THE MECHANICS' LIEN LAW OF OHIO.

The law of 1894 was a radical departure from former mechanics' lien laws of Ohio, and from the settled doctrine of the Ohio Courts. The first general mechanics' lien law enacted by the legislature of Ohio was passed on March 11th, 1843 (41 O. L., 66). It embodied every essential feature of the mechanics' lien law of the State up to the passage of the act of 1894. It gave a lien to principal contractors and also to subcontractors. The subcontractor, laborer or material-man, to secure a lien, was required to file with the owner an attested account of the amount and value of the work and labor performed or materials furnished for which payment had not been made. On receipt of this notice the owner was required to retain subsequent payments due [the principal contractor for the benefit of the person or persons filing such attested accounts. The owner was then required to serve a copy of such attested account on the principal contractor, and if such contractor did not within ten days after receipt of a copy of such attested account give notice of his intention to dispute the claim, or arbitrate or adjust it with the subcontractor, or if for ten days after giving such notice he should neglect or refuse to adjust or arbitrate the same, he was considered as assenting to the demand of the subcontractor, laborer or material-man, and the owner was required to pay the same. Every person entitled to a lien was also required to file an account with the recorder of the county in which the improvement was made, showing the items of labor, skill, material and machinery furnished, which account was to be recorded in a book kept for that purpose. The lien being thus acquired continued for two years and was enforcible by

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appropriate legal proceedings. The principal contractor desiring a lien was also required by section two of the act, to file his attested account with the owner, and also with the county recorder (Sec. 7). The significant provisions of the law are two: *First*, the law provided for *notice* to the owner in all cases and notice to both owner and principal contractor in case subcontractors, laborers, or material-men sought to acquire liens; *second*, the subcontractor, laborer or material-man *stood in the shoes of the principal contractor and were subrogated to his rights.* The owner was bound by his contract with the original contractor and that contract measured the rights of all persons dealing with the original contractor.

The law of 1843, outside of some minor amendments, (Curwen's Statutes, 1520, 2201), remained in all its features until May 1st, 1871 (68 O. L., p. 107). The second section was then amended and enlarged and the protection afforded mechanics, laborers, contractors and material-men was somewhat increased, but the subrogation of all persons contracting with the original contractor to his rights and the manner of notice to the owner and all interested parties were preserved intact. Although several subsequent amendments were made, these predominant features remained unaltered until the enactment of the law of 1894, which sought to dispense with the matter of notice and to make the owner's property liable to any and all subcontractors, regardless of the account between the owner and the original contractor. Under the early legislation of Ohio, the lien acquired by a subcontractor was on the funds in the owner's hands and not on the building, but subsequent legislation provided a method whereby he might acquire a lien on the building or improvement, but only to the extent of undisbursed funds in the owner's possession at the date of notice and filing of the attested account with the county recorder. A partial historical summary of mechanics' lien legislation in Ohio, is

given by Judge GRANGER in his dissenting opinion in *Smith Bridge Company* v. *Bowman*, 41 O. S., 37. See also Rockel & White, Ohio Lien Law, pp. 47, 50.

Judge BURKETT, in *Standard Oil Company* v. *Sowden, Assignee*, 55 O. S., 341, in speaking of the mechanics' lien law, says:

> "The mechanics' lien law has been amended from time to time and each amendment evinces a purpose on the part of the general assembly to more effectually secure the mechanics, laborers, and furnishers of materials in the collection of moneys earned by them. The object of the statute is to tie up the money owed by the owner of the structure and make it security for the indebtedness to the mechanics, laborers and furnishers, and those holding under them, their rights to the fund to be determined by the ordinary rules of law and equity."

Aside from the legislative intent as embodied in the Statute, the Courts of Ohio by an unbroken line of decisions, have held that the rights of subcontractors are circumscribed by those of the original contractors.

In construing the act of 1843 (Swan & Critchfield's Stat., 833), in the case of *Copeland* v. *Manton*, 22 O. S., 398, 403, 404, it was said:

> "It seems to be the policy of the act to confer upon the subcontractor only the right to be subrogated to the claims of the contractor, under his contract with the owner, at the time the requisite notice is given. If, therefore, the contractor has *then* no claim against the owner, or there are no more payments due or to be made to *him*, the act does not in terms or effect bind the owner to retain anything for the benefit of the subcontractor, and he obtains no lien on the amount the owner is bound in law and equity to pay to another.
>
> "The position of the subcontractors in this respect is much the same as if they had garnished the owner by proceeding in attachment. Both forms of proceeding are statutory remedies to subject a claim due to a debtor to the payment of his debt, and whenever available, are, in effect, substantially alike. It is a funda-

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mental principle that an attaching creditor can stand on no better footing, as against *bona fide* purchasers or assignees of his debtor, than the latter does at the time of the attachment or garnishment."

So in the case of *Dunn* v. *Rankin*, 27 O. S., 132, the Supreme Court of Ohio said:

"Under the statute to create a lien in favor of mechanics and others, the claim of a subcontractor against the owner of the structure is limited to the work and materials furnished in performing a particular contract between the owner and contractor in relation to such structure; also to the amount unpaid on such contract at the time he delivers to the owner his attested account against the contractor for such work and materials.

"Where independent jobs are let under separate contracts, though between the same owner and contractor, the liens of the subcontractors are respectively confined to the amount unpaid on the particular contract each one aided the contractor to perform."

In *Bullock* v. *Horn*, 44 O. S., 420, 424, SPEAR, J., in passing on the rights of sub-contractors arising under the mechanic's lien law of Ohio, said:

"In giving a construction to this statute, by fair inference it may be assumed that the rights of the workman and material-man, as against the owner, are based upon the latter's contract with the contractor, and and while they are subordinate to the contract, and are to be worked out through it, those parties have the right to rest in security upon it and the means provided by law to secure its application to their demands. In the absence of fraud they are presumed to have notice of the terms of the original contract. Hence, if the original contract showed that payment had been made in advance to the contractor, or if it contemplated the allowance, by the contractor, of set-off then held or to be acquired by the owner as payment, such provisions would bind the workmen and material-men, as they would be held to have accepted employment of the contractor with an implied assent to such terms."

To the same effect is Rockel and White—the only Ohio text writers on the lien law of the State—pp. 112, 113, 114.

The Supreme Court of Ohio, when called upon to determine the validity of the act of 1894, in the case of *Young* v. *The Lyon Hardware Co.*, 54 O. S., 423, refused to depart from the settled and uniform doctrine, and held:

> "The act of April 13, 1894, 91 O. L., 135, in so far as it gives a lien on the property of the owner to subcontractors, laborers, and those who furnish machinery, material, or tile to the contractor is unconstitutional and void. All to whom the contractor becomes indebted in the performance of his contract, are bound by the terms of the contract between him and the owner."

The same principle is announced in *Stark* v. *Simmons*, 54 O. S., 435, and in *Mack* v. *DeGraff and Roberts' Quarries*, 57 O. S., 463.

No clearer statement of the fundamental principle underlying the Ohio doctrine can be found than in the early case of *Hampson et al.* v. *The State*, 8 O., 321, 322, decided in 1838, and hereafter quoted.

The foregoing as evidenced by the statutes and an unbroken line of decisions was the construction placed on the mechanic's lien law of Ohio when Jones and Laughlins and Sosman and Landis contracted with McClain, the original contractor with The Great Southern Fire Proof Hotel Company, and they and each of them were bound by the law as thus fixed and determined.

As the question is a new one in the Federal Courts, it is their duty to give weight to the decisions of the Courts of the State, whose law they administer.

> *Farmer's Nat. Bank* v. *Sutton Manfg. Co.*, 6 U. S. App., 312; 52 Fed. Rep., 191.

The case is one of those in which "for the sake of harmony and to avoid confusion, the Courts of the United States will lean towards an agreement of views with the State Courts, if the question seems to them balanced with doubt."

Burgess v. *Seligman*, 107 U. S., 20.

THE OHIO DOCTRINE FOUNDED ON REASON AND SUSTAINED BY OTHER COURTS.

> "A sub-contract, as its very name indicates, is subordinate to the original contract. A sub-contractor's lien therefore depends on the original contract, and is, like the lien of the contractor himself, governed by its terms."
>
> Boisot on Mechanic's Liens, Sec. 228.

The laborer, subcontractor or material-man can know and must take notice of every term of the agreement under which the original contractor is proceeding to build. He is charged with notice of the general character of the building, what price is to be paid for it, the manner and time of payment, and of the labor and materials proper to be used in its construction. He must see that the materials he supplies are furnished at the proper time, and are such as are required both as to quantity and quality. He is bound to know whether or not the original contractor has stipulated that the building shall be delivered free from liens. If such provision be embodied in the contract with the owner, neither the original contractor nor his subcontractors, laborers or material-men, can acquire a lien on the premises. He is bound to know whether the original contractor has agreed to look for payment to the personal responsibility of the owner, or to both the owner's personal responsibility and the premises; whether he has agreed to accept payment in lands, or chattels, or money; whether the building is to be brick, or wood, or marble, or to be roofed with slate, tin or shingles. If the contract stipulates that the building shall be constructed for one thousand dollars, or any other specified sum, he cannot compel the owner to pay a larger sum unless there be extras.

It is a familiar doctrine that the subcontractor is bound by the plans and specifications embodied in and made a part of

the original contract between the owner and the original builder; he must observe them in their minutest details as must the original builder. Should he depart in any manner from the designs, the dimensions, materials, plans, shapes, and sizes, as expressed in the original contract, he does so at his own peril. He is merely the representative of the original contractor—his agent—with no powers and no rights not belonging to such original contractor. He undertakes to perform the contract of the latter with the owner, either in whole or in part. He is not permitted to say that he does not know the particulars of such contract. It is a legal necessity arising from the fact that he has undertaken to do the work which his principal has engaged to do. Having assumed to perform his principal's contract with the owner, he must perform it according to its express limitations, and for the amount therein named. He cannot have the benefit of the builder's contract without accepting its burdens, or without accepting the conditions on which those benefits are conferred. Were it otherwise, he would defeat the explicit contract of the owner upon a point without which the owner probably would never have consented to it. If the law were to tolerate this method of dealing with building contracts, the original contractor might sub-let his contract by portions to different persons, and a contract might be enforced against the owner to which he never consented, and such is the necessary consequence of the act of 1894.

It is no hardship to enforce against laborers, material-men and subcontractors, the provisions of the original contract with all its limitations. Otherwise the owner has no means of protecting himself, because he cannot know to whom the contract or portions thereof may be sub-let. The subcontractor may, if the price and other terms of the contract do not suit him, refrain from contracting. No good reason exists for giving the extraordinary privilege to subcontractors

of repudiating one of the most important terms of a contract —that relating to the price of the building—or of taking from the owner the right to insist on the performance of his contract according to its very terms.

Brown v. *Cowen*, 110 Pa. St., 588, reviewed a lower Court which had held that it made no difference what the contract was between the owner and principal contractor: that the material-man and subcontractor having been led by the original contractor to furnish the lumber on the credit of the building, had a right to a lien.

The Supreme Court of Pennsylvania, however, in the Brown case, held that a contractor can only bind the building by virtue of the peculiar statutory relation he bears to the owner under the contract; *that the instruction of the Court below was palpably erroneous: that the owner of a building could thus be entrapped into the payment of a debt which he never contracted, and which was not contracted by any one having any legal authority to bind him or his estate, is so monstrous that the mere statement of the proposition is sufficient argument to refute it. It is the plain obvious duty of one who deals with an alleged contractor to know the relation which he bears to the owner; failing in this he furnished lumber and material at his peril.*

The provision of a contract fixing the price of a building is as sacred as any other portion of it.

In *Taylor* v. *Murphy*, 148 Pa. St., 337. 33 Am. St., 825–827, the Supreme Court of Pennsylvania held, that if a statute should authorize the entry of a lien for work or material in violation of the terms of a contract waiving a right to a lien, and stipulating that the building should be delivered free therefrom, it would be in contravention of that section of the Constitution which declares that no law shall be passed impairing the obligation of contracts, and further added, "It might also be within the limitation on

the powers of the several States, found in Article I., Section 10, of the Constitution of the United States."

See also, *Benedict* v. *Hood*, 134 Pa. St., 289, 19 Am. St., 698.

The case of *Schroeder* v. *Galland*, 134 Pa. St., 277; 19 Am. St., 691, was one in which a head contractor had stipulated to deliver the building, on its completion, to the owner free from all liens and incumbrances. The Court held that a subcontractor cannot file a lien against the building for work done or material furnished by him in its erection. The subcontractor is charged with knowledge of all the terms and stipulations of the contract between the owner and principal contractor, and is bound by them. It would be passing strange for us to hold, said the Court, "that the right of a subcontractor for part of a building is of so sacred a character that it shall not be bound by the express limitations of a written contract under which and by force of which his own contract must be performed. His right of lien has no existence at common law, or in equity. It is a creature of statute alone, but the statute confers upon him no special prerogative to transcend the most familiar principles of the law, and to claim privileges which are denied to all other citizens in the determination of their contract rights. * * * * * The owner contracts with the builder to erect a house on certain terms, and the builder makes a subcontract with a material-man to supply the materials. The claim of relationship consists of but two links, the second of which hangs by the first, and will bear no greater weight. * * * * The allowance of any lien at all to a subcontractor, is a special privilege, granted only in case of buildings; and it is not unreasonable to require him to look to the principal contract to ascertain whether it is such as to justify him in becoming a contractor under it. The argument that the law and the principal contract make the builder the agent of the owner,

Right to statutory at common law.

proves nothing. Suppose the fact to be so, still his agency is only special, limited by the terms of the contract. He is to employ men to build the house in the manner and on the terms there indicated. For anything beyond that he exceeds his authority and does not bind the principal."

The same doctrine is announced in

Dickinson College v. *Church*, 1 Watts, & S., 462.
Sharer v. *Murdock*, 36 Cal., 298.
Henley v. *Wadsworth*, 38 Cal., 356.
Bevan v. *Thackara*, 143 Pa. St., 182; 24 Am. St., 529.
Fidelity Mut. Life Assn. v. *Jackson*, 163 Pa. St., 208.
Ballman v. *Heron*, 160 Pa. St., 377, 384, 385.
Overton on Liens, Sec. 553.
Henry v. *Rice*, 18 Mo. App., 497.
Jones on Liens, 2nd Ed., Vol. 2, Secs. 1289, 1289*a*.
Note to French v. *Bauer*, (N. Y.) 20 L. R. A., 560, 561, 562, 563.

THE ACT OF 1894 IS UNCONSTITUTIONAL.

The act of 1894 runs counter to all former Ohio legislation and decisions.

Section 3184 specifies the property on which a laborer, material-man or contractor may acquire a lien. Sec. 3185 designates the time within which the lien must be taken, the necessary steps to perfect the same, and the period of the continuance of such lien. By Section 3185*a* the lien is limited to the actual value of the labor, material, or machinery furnished. In the absence of fraud or collusion between the owner and original contractor, the aggregate amount of liens is not to exceed the contract price agreed upon between the owner and the original contractor for the performing of such labor and the furnishing of such material and machinery.

If the law be valid, laborers, subcontractors and material-men may thus acquire liens in an amount not in excess of the original contract price, but wholly irrespective of the state of account between the owner and his original contractor. Although the owner may have paid in strict accordance and complied with every term of his contract, and may have so paid the full contract price for his building, yet the above mentioned sections of the Revised Statutes pretend to give laborers, subcontractors and material-men, if the original contractor fails or neglects to pay them, a lien on the owner's property for their several claims to an amount not exceeding the contract price of the house, in case such amount has been fixed without fraud or collusion. The law further provides for the enforcement of such liens regardless of how much the owner may be compelled to pay in excess of the contract price for his building, subject to the limitation above mentioned. The owner who has thus scrupulously fulfilled his contract may be required to pay for his improvement a second time. The contract price does not determine what he shall pay, or what the lienholder shall recover. The lien may be taken at any time within four months from the date of performing the last item of labor or furnishing the last item of material or machinery. No notice to the owner of the taking of a lien is required. The owner may have honestly paid for his property in full, yet at any time within four months from the date of its completion, valid liens may be filed against the same from persons possibly wholly unknown to him, and with whom he never contracted. He is constituted the guardian, as it were, of every laborer, subcontractor and material-man having anything to do with the construction of his building, whoever and wherever such person may be. If he contract to pay, and actually does in good faith pay, for his building in advance, or by the transfer of land, or by the cancellation and surrender of a previously

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existing claim held against the original contractor—and he may lawfully do any of these things—he must, nevertheless, according to the statute, pay again and *in money* to the sub-contractor to discharge his lien, and to the full amount of his contract price.

The mechanics' lien law in question interferes with the liberty and right of the subject to acquire property; to make and enforce contracts; to use, buy and sell property and contract in respect thereto; to fix the price at which labor shall be performed or materials furnished, and the mode and time of payment. It is class legislation of the most odious nature. It discriminates against the owner of real estate who wishes to improve it, and, if it does not deny his right to contract, attaches terms and conditions not affixed to any other contract which he or any one else may make. It discriminates against the financially poor contractor and in favor of the rich, because prudent owners will contract only with men who in any event are able to pay and out of their own means if necessary. It discourages the erection of homes by the poor who must limit their expenditures to a specified sum, because, under the statute, no one commencing the erection of a building can know what will be its ultimate cost.

Such a monstrous enactment could not long remain unchallenged. Its validity was attacked as soon as an occasion arose therefor in the Courts of the State in the case of *The Lion Hardware Company* v. *L. F. Young*, in the Circuit Court of Clark County, and a decision was rendered sustaining the Statute. In the November Term of 1895 of the Circuit Court of Putnam County, that Court declared the enactment to be unconstitutional, in the case of *Palmer & Crawford* v. *Tingle*, 9 O. C. C. Rep., page 708.

These cases found their way as rapidly as possible to the Supreme Court of the State, and on December 8, 1896, in the case of *L. F. Young* v. *The Lion Hardware Company*, 55

O. S., 423, the Supreme Court of the State considered and passed upon the Statute and declared the same to be unconstitutional.

The syllabus is as follows:

> "The inalienable right of enjoying liberty and acquiring property, guaranteed by the first section of the Bill of Rights of the Constitution, embraces the right to be free in the enjoyment of our faculties, subject only to such restraints as are necessary for the common welfare.
>
> "Liberty to acquire property by contract, can be restrained by the general assembly only so far as such restraint is for the common welfare and equal protection and benefit of the people, and such restraining statute must be of such a character that a Court may see that it is for such general welfare, protection and benefit. The judgment of the general assembly in such cases is not conclusive.
>
> "While a valid statute regulating contracts is, by its own force, read into, and made a part of such contracts, it is otherwise as to invalid statutes.
>
> "The Act of April 13th, 1894, 91 O. L., 135, in so far as it gives a lien on the property of the owners to subcontractors, laborers and those who furnish machinery, material or tile to the contractor is unconstitutional and void. All to whom the contractor becomes indebted in the performance of his contract, are bound by the terms of the contract between him and the owner."

It will be seen from the statement of the case that the cause from Putnam County was based upon a contract made on the 23rd day of April, 1894, the very month the law was enacted, and that the cause from Clark County was based upon a contract made on the 29th of June, 1894, a little over two months after the passage of the Act. Hence it will be seen that the people of the State of Ohio were not remiss in calling into question the validity of the enactment.

The Circuit Court of Putnam County declared the enactment to be unconstitutional and that of Clark County

declared it to be constitutional. The Supreme Court affirmed the case from Putnam County and reversed that from Clark County and declared the statute to be unconstitutional and invalid.

It is obvious that the people of the State let no time pass in bringing the law to the attention of the Courts, and that the Courts passed upon the matter promptly and gave to the people of the State the final declaration as to the validity or invalidity of this enactment, by declaring it invalid. There has been no diversity of decision by the Court of last resort. The two cases that have been brought to its attention have both been decided the same way, hence it may be accepted as the final decision of the Supreme Court of Ohio upon this law. The decision of the Supreme Court now stands as the law of the State and is binding upon all of the inhabitants of the State. No citizen of Ohio can assert a subcontractor's or material man's lien under this statute.

THE LAW INVADES THE PROPERTY OWNER'S RIGHT OF CONTRACTING.

The right and liberty of contract being inalienable and guaranteed by the Constitution can be restrained only when necessary for the equal protection and benefit of the people, and for the common welfare. Such necessity so warranting the invasion of such right must clearly appear to the legislature, and also to the Courts of justice. No public necessity exists for denying the liberty of contract to the owner of a building, that laborers, subcontractors and material-men may collect for labor furnished and material and machinery sold, from a man who did not employ the labor or purchase the material or machinery, and who has already paid all that he was bound to pay, and for all that he received.

As stated in *State* v. *Loomis*, 115 Mo., 313, the word "liberty" includes and comprehends, among other things, the right to freely buy and sell as others may.

Second Story on Constitution, 5 Ed., Sec. 1590.

The privilege of contracting being both a liberty and property right, liberty necessarily includes the right of acquiring property and consequently of making and enforcing contracts. The constitution secures to the subject the right of using, buying, and selling property, and of contracting in respect thereto, and the legislature has no power to prevent persons who are *sui juris* from making their own contracts. *Ritchie* v. *People*, 155 Ill., 98; *State* v. *Loomis*, 115 Mo., 307; *Frorer* v. *People*, 141 Ill., 171. "The right to contract necessarily includes the right to fix the price at which labor shall be performed and the mode and time of payment. Each are essential elements of the right to contract and whosoever is restricted in either, as the same is enjoyed by the community at large, is deprived of liberty and property." *Braceville Coal Co.* v. *People*, 147 Ill., 66; 21 L. R. A., 792, 793, Note.

The Mechanics Lien Law of Ohio now in question, if constitutional, permits a subcontractor to ignore the original contract for the construction of a building, and impose upon the owner a burden never contemplated in his original contract. The law modifies and varies the contract made by the owner without notice and without his consent. It attempts to create an agent for the owner out of the contractor whose interests are opposed to those of his principal. The agent, in violation of a primary principle of law, is made to serve two masters, himself and the owner. The Mechanics Lien Law thus abrogates a settled maxim and removes one of the safeguards for the protection of individual rights.

It is true that "in many cases, the Courts, in the exercise of their ordinary jurisdiction, cause the property vested in one person to be transferred to another, either through the exercise of a statutory power, or by direct force of their judgments or decrees, or by means of compulsory conveyances," but in such cases, "the right of one man is divested by way of enforcing a higher and better right in another."

Cooley's Constitutional Limitations [3rd Ed.], Sec. 358.

The rights of the laborer, subcontractor and material-man, are no higher and better than those of the property owner. The same rights are guaranteed by the constitution to all alike.

Without the consent of the property owner, without any existing contract between him and the laborer, material-man or subcontractor, the owner's property, as proposed by the Ohio Mechanics Lien Law, shall be taken from him to pay the laborer, material-man or subcontractor for something claimed to have been done or furnished for the original contractor.

> "But there is no rule or principle known to our system under which private property can be taken from one person and transferred to another, for the private use and benefit of such other person, whether by general law or a special enactment."
>
> Cooley's Const. Lim., Sec. [3rd. Ed.] 357.

The Mechanics Lien Law of Ohio makes the owner of real estate surety for the original contractor. One party to a contract, by force of legislation, is made surety that the other contracting party will perform his contract; in effect, the owner contracting with himself, and that too without any means of knowing the extent of his liability as surety.

Palmer & Crawford v. *Tingle*, 9 O. C. C., 708, 712.

Laborers, subcontractors and material-men are charged, in the making of contracts, with the same degree of care and caution required of persons not favored by dangerous class legislation, of ascertaining whether such third persons have any authority to encumber another person's property for either labor or material, which the contractor may find necessary to procure from others in order to complete the work. If the respondents' construction of the act of 1894 prevails, it simply means that an owner cannot, by the making of even the most 'iron clad' contract imaginable, prevent the placing on his property of an encumbrance created by others, and without his consent. Furthermore, it means that while everybody else shall pay but once for what he contracts, the unfortunate owner of land, who attempts to improve it by erecting buildings thereon, must pay twice, notwithstanding the fact that he seeks to protect himself from this palpable and really monstrous injustice by the making of an express contract that the property should be turned over to him free and clear from all liens of any kind whatsoever.

The Supreme Court of Ohio placed its objection to the law of 1894 *on the ground that it was an unreasonable and oppressive restraint on the owner's liberty of contract.* "The owner," said the Court, 55 O. S., pp. 442-443, "has the right to acquire his building upon the best terms possible, and if he can by making a contract to pay in advance, or by exchange of securities or other property, acquire his building cheaper than by contracting to pay after four months from its completion, he has the inalienable right to so acquire it, and to be protected in its enjoyment, and it is not within the power of the General Assembly to compel him to pay a higher price for his building for the protection of laborers and furnishers with whom he has no contractual relation. To enable the contractor, by force of this statute, to enlarge the price to be paid by allowing liens to be taken on the property for labor and materials,

would be as unjust as to authorize the owner by statute, to enlarge the building, without a corresponding increase in payment."

It was urged on the hearing of this case below that inasmuch as the law of 1894 had been enacted prior to the date of the contract made by the Hotel Company with McClain, that the law entered into and formed a part of the contract. This argument, the Ohio Court met by saying (p. 443):

> "But it is urged that the act is constitutional, for the reason that the statute itself must be read into the contract, and that thereby the owner agreed that the contractor may obtain labor and materials for which a lien may be taken against the owner's property. This begs the question, and assumes the constitutionality of the statute. If the statute is valid it must be read into the contract, but if invalid it binds neither party and does not become a part of the contract."

This position of the Court is abundantly sustained by authority.

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."
> *Norton* v. *Shelby Co.*, 118 U. S., 442;
> 3 Am. & Eng. Ency. of Law, 678.

> "It is now axiomatic 'that everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land.'"
> *State* v. *Loomis*, 115 Mo., 313;
> Cooley's Con. Lim., [3d Ed.] Secs. 313, 314.
> *Dartmouth College* v. *Woodward*, 4 Wheat., 518.

In *Meyer* v. *Berlandi*, 39 Minn., 438, 12 Am. St., 663, a case involving the validity of a mechanics' lien law, in answer to the argument that the law enters into and forms a part of the contract, MITCHELL, J., used the following language:

> "It is no answer to this objection to say that all incumbrances, or other interests in property acquired subsequent to the passage of the act, must be deemed as taken subject to the provisions of the law which enter into and form a part of the contract. This rule, which is a familiar one, always presupposes that the law is valid. It is no more in the power of the legislature to pass a law taking from a man, without his consent, and without process of law, property which he may thereafter acquire, than it is to pass a law depriving him of property which he had acquired before its passage."

In *The State of Ohio* v. *Lessees of Public Works*, 3 Bull, 265, it was held that an unconstitutional act is simply a nullity. If the contention is right that any law, constitutional or otherwise, enters into and forms a part of a contract, then an unconstitutional law neither adds to nor subtracts from a contract. The contract will exist as an independent fact, unmodified by such unconstitutional law, and as if such law were non-existing. The contract will itself, in case the law be unconstitutional, fix the rights of the parties regardless of the pretended law, because the law being a nullity there is no law to enter into, or to be read into the contract. If the law which attempts to give to subcontractors a lien is unconstitutional then the subcontractors stand without remedy and without right to a lien.

THE LAW IS OBNOXIOUS TO THE OHIO BILL OF RIGHTS.

The Ohio Court held that restraint upon the property owner's liberty of contract is prohibited by the Ohio Bill of Rights. In speaking of the fundamental rights enumerated therein, the Court said, 55 O. S., pp. 440, 441, 442:

> "The preamble to the constitution is as follows: 'We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare do establish this constitution.'

"It is worthy of notice that the constitution is established to secure the blessings of freedom, and to promote the common welfare. As the constitution must be regarded as consistent with itself throughout, it must be presumed that the laws to be passed by the general assembly under the powers conferred by that instrument, are to be such as shall secure the blessings of freedom and promote our common welfare.

"To make this more emphatic, the first section of the Bill of Rights provides that 'All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.' And by the second section it is provided that, 'All political power is inherent in the people. Government is instituted for their equal protection and benefit.'

"The usual, and most frequent means of acquiring property is by contract, and one of the most valuable and sacred rights is the right to make and enforce contracts. The obligation of a contract when made and entered into, can not be inpaired by act of the general assembly. Article 2, Sec. 28.

"The word 'liberty' as used in the first section of the Bill of Rights, does not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. *People* v. *Marks*, 99 N. Y., 377; 52 Am. R., 34; *Berthof* v. *O'Reilly*, 74 N. Y., 15; 30 Am. R., 323; *Matter of Jacobs*, 98 N. Y., 98; 50 Am. R., 636.

"Contracts and compacts have been entered into between men, tribes and nations during all time from the earliest dawn of history, and the right and liberty of contract is one of the inalienable rights of man, fully secured and protected by our constitution, and it may be restrained only in so far as it is necessary for the common welfare, and the equal protection and benefit of the people. That such restraint of the right and liberty of contract is for the common public welfare, and equal

protection and benefit of the people, must appear not only to the general assembly, by force of popular clamor, or the pressure of the lobby, but also to the courts, and it must be so clear, that a court of justice in the calm deliberation of its judgment, may be able to see that such restraint is for the common welfare and equal protection and benefit of the people. *People* v. *Gillison*, 109 N. Y., 389. 4 Am. S. Rep., 465.

"The statute in restraint of the liberty to contract as to the interest on money, is valid for the reason that all can see that it is for the common welfare.

"Many other like cases of restrainst as to contracts are to be found in our statutes, but all of them, in so far as they are valid, depend for their validity upon the same principle. It was the infringement of the liberty of contract that induced this Court in *State* v. *Lake Erie Iron Co.*, unreported, to hold the statute unconstitutional which required corporations to pay their employes at least twice in each month. Our exemption laws can be sustained only on the ground, that while they in a slight degree limit the liberty of contract, such limitation is for the general welfare of the whole people, and does not interfere with their equal protection and benefit.

"In such cases Courts can see that the slight restraint of the liberty of contract, is for the common welfare of the people, but no Court can see that it is for the common public welfare that the liberty of contract should be taken away from the owner of a building, to enable the seller of materials to collect their value from a man who never purchased them, and has already fully paid the one with whom he contracted for all that he has received. There can be no public necessity for making the contractor the agent of the owner, to enable the seller of materials to collect his pay from one who does not owe him, and with whom he has no contract.

"An agent can have no interest adverse to his master, but this statute attempts to create an agent for the owner out of the contractor who is opposed to him in every interest. It is an attempt to make the contractor serve two masters, himself and the owner. This cannot be done. For this we have the highest authority."

The Ohio decision was not based on any claim on the Court's part of the right to pass on the propriety of this or that legislative enactment. The law was held to violate certain specified provisions of the Bill of Rights in that it invaded the right of contract.

Cooley, in his Constitutional Limitations, 6th edition, after enumerating on pages 47 and 48, the usual contents of Bills of Rights, among which will be found those embodied in Sections one and two of Article one of the Constitution of Ohio, says, on page 209: "Nor, where fundamental rights are declared by the Constitution, is it necessary at the same time to prohibit the Legislature, in express terms, from taking them away. *The declaration is itself a prohibition, and is inserted in the Constitution for the express purpose of operating as a restriction on legislative power.*"

"A Bill of Rights," says Black in his work on Constitutional Law, page 9, "is in the nature of a classified list of the rights and privileges of individuals, whether personal, civil or political, which the Constitution is designed to protect against governmental oppression. It is a charter of liberties for the individual, and a limitation upon the power of the State." As said in *Van Horn's Lessee* v. *Dorrance*, 2 Dall, 304, 311, "The Constitution is the origin and measure of legislative authority"; and as the Legislature is itself a creature of the Constitution, owing its existence to it and deriving its powers therefrom, its acts must be conformable to it or else they will be void. It is not only the province but the duty of the Court to determine when the Legislature has exceeded its authority. This duty was performed in the Young case.

While there must be a clear violation of the Constitution to warrant the judiciary in declaring an act of the Legislature unconstitutional and void, "still, there is reason and authority for holding that if a statute is contrary to the

spirit of the constitution and the implications necessarily drawn from it, or to the fundamentals of justice and good government, or to those cardinal principles of the social compact which underlie all legislation and enter into the frame work of representative government, it is in the power of Courts to pronounce it void." 3 Am. & Eng. Ency. of Law, 674.

The statement of this doctrine is found in the early cases of *Calder* v. *Bull*, 3 Dallas, 386; *Wilkinson* v. *Leland*, 2 Pet., 657, and is reaffirmed in the 165 U. S., pages 159, 160, where it is said:

> "The first official action of this nation declared the foundation of the government in these words: 'We hold these truths to be self-evident that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declarations of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases recourse must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and spirit, and it is always safe to read the letter of the Constitution in the spirit of the declaration of independence. No duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

If for the sake of argument it be conceded that the question herein involved is merely one of general law having as much reference to the Constitution of any other State as to that of Ohio, as claimed by the Circuit Court of Appeals and by opposing counsel, still the lien law of 1894 is unconstitutional, because the act is contrary to the great first principles of the social compact and cannot be considered a rightful exercise of legislative authority.

Calder v. *Bull*, 3 Dall., 386.

As said by Mr. Justice CHASE in his opinion, a law that destroys or impairs the lawful private contract of citizens, or a law that takes property from A and gives it to B, is one which it is against all reason and justice for a people to entrust a legislature with power to enact, and it cannot, therefore, be presumed that they have done so. "The people of the United States," said he, "erected their constitutions or forms of government to establish justice, to promote the general welfare, *to secure the blessings of liberty*, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican government, that no man should be compelled to do what the laws do not require, nor refrain from acts which the law permits. There are acts which the Federal or State legislature cannot do without exceeding their authority. There are certain vital principles in our free republican government, which will determine and overrule an apparent and flagrant abuse of legislative power, as to authorize manifest injustice by positive law, or to take away that *security for personal liberty or private property*, for the protection whereof the government was established. * * * An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act,

which when done, was in violation of no existing law; a law that *destroys or impairs the lawful private contracts of citizens;* a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B. It is against all reason and justice for a people to entrust a legislature with such powers; and therefore it cannot be presumed that they have done it. The genius, the nature and the spirit of our State governments amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid and punish; they may declare new crimes; and establish rules of conduct for *all* its citizens in future cases; they may command what is right and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent, lawful, private contract; *or the right of private property.*"

Calder v. *Bull*, 3 Dall., 386.

The Ohio law of 1894 destroys the security for personal liberty and private property. It takes away A's property to give it to B, with whom A has nothing in common and no privity of contract.

That a law which runs counter to the fundamental principles of the social compact is beyond the sphere of legislative authority, both State and National, is announced also in—

Osborn v. *Nicholson*, 13 Wall., 662;
Gunn v. *Barry*, 15 Wall., 623;
Taylor v. *Porter*, 4 Hill., 146;
Wynehamer v. *People*, 13 N. Y., 394;
Wilkinson v. *Leland*, 2 Pet., 658;
Gulf, Col. & Santa Fe R. R. Co. v. *Ellis*, 165 U. S., 150.

The Ohio Court did not interfere with or seek to overthrow the exercise of legislative discretion. It did not nullify the act of 1894 on the vague ground that it was

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opposed to the "latent spirit" supposed to pervade or underlie the constitution, which neither its terms nor its implication disclose. The same Court in *Walker* v. *Cincinnati*, 21 O. S., 41, expressly held that legislative powers must be exercised within the constitutional limitations. The limitation overstepped in the act of 1894 is found in the Ohio Bill of Rights which prohibits the invasion of the right of contract and provides for equal protection to all. "That government can scarcely be deemed to be free where the rights of property are left solely dependent on the will of the legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no Court of justice in this country would be justified in assuming that the power to violate or disregard them, a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being without very strong and direct expressions of such an intention."

Wilkinson v. *Leland*, 2 Pet., 627.

> "The right of acquiring, possessing, and protecting property is natural, inherent and inalienable; it is not *ex gratia* from the legislature, but *ex debito* from the constitution."
>
> *Van Horn* v. *Dorrance*, 2 Dall., 304, 311.

It was not necessary that the Ohio Court should have found that the enactment of the law of 1894 was expressly prohibited by the constitution. It is impliedly prohibited by the Bill of Rights, and what is implied is as much a part of the constitution as what is expressed.

Ex parte Yarbrough, 110 U. S., 651.

On the hearing in the Circuit Court of Appeals, opposing counsel cited, and the learned Judge who wrote the opinion relied on *Olcott* v. *Supervisors*, 16 Wall., 678, to sustain the contention that only a question of general law is involved, and that therefore the Federal Courts should not follow the Supreme Court of Ohio. An analysis of that case distinguishes it from the case at bar. The question there involved was one of taxation—the issuance of bonds by a County to aid in the construction of a railway. The Supreme Court of Wisconsin, prior to the issuance of the bonds, had repeatedly held that the construction of a railroad was a matter of public concern, and "prior to 1870, it seems to have been well settled in Wisconsin as elsewhere," says Mr. Justice STRONG, "that the construction of a railway was a matter of public concern, and not the less so because done by a private corporation." After the bonds were issued and sold, the Supreme Court of the State held that the State had no power to authorize the imposition of taxes to aid in the construction of a railroad, and that therefore the act under which the bonds were sold was invalid. There was a change of decision after the bonds were sold, and a departure from the former rulings of the Court. The contract, when made, was by all precedents established by the State Court a valid one. Not so in the case at bar. By all former rulings in Ohio, there could be only a derivative lien in favor of a material-man or subcontractor. His rights as determined by an unbroken line of authorities were wholly dependent on those of the principal contractor. There was every reason to believe that the Ohio Court would consistently maintain the oft repeated doctrine announced by it, and it in fact did so. Jones and Laughlins and Sosman and Landis contracted with McClain subject to the future adjudication of the Ohio Court upon the statute involved, knowing that the Court had, whenever opportunity presented, announced a

doctrine in conflict with the spirit and purpose of the law of 1894. They made their respective contracts with McClain without any declaration that the law was valid. The doctrine of *Pleasant Township* v. *Ætna Life Ins. Co.*, 138 U. S., 70, applies, where it was said: "It is true that the defendant in error became the purchaser and the holder of these bonds before the last adjudication of the State Court. It did not, therefore, buy with judicial declarations, that the series of acts under one of which it claims, was in conflict with the constitution; and yet, it purchased without any such declaration that it was valid."

It may be said that the law giving a lien in favor of those who furnish labor and material for the construction of railroads (R. S. of Ohio, Secs. 3207–3211) embodies the principal of the law of 1894, in that it gives subcontractors a direct or independent lien, and is therefore an exception to the uniform character of Ohio legislation on the subject of mechanics' liens, and that the Supreme Court of Ohio in *Railway Co.* v. *Cronin*, 38 O. S., 122, and *Railway Co.* v. *McCoy*, 42 O. S., 251, were suits under that law in which liens were held good. To this we answer the constitutionality of the law was not questioned or involved in either of the above named cases, and Courts will not pass on the constitutionality of a law unless the issue be raised by the pleadings. *John Spry Lumber Co.* v. *Sault Savings Bank & Trust Co.*, 77 Mich., 199. Cooley's Constitutional Limitations (3rd Ed.), Sec. 163. Moreover, it does not appear in either of the above Ohio cases that the principal contractor had been paid. Besides the lien law relating to railway companies makes notice to the property owner an essential prerequisite to the procurement of a lien. The questions presented in the case at bar were not presented to the Court in either of the above Ohio cases. Had they been before the Court, it is manifest from the decision made in *Young* v. *The Lion Hardware Co.*, that the

law granting independent liens on the property of railway companies to subcontractors would have been held invalid. The present case arises not under a change of decision, but on an amendment to and modification of the law.

Mechan law not exercis police p

We presume it will not be seriously contended here as below, that a mechanics' lien law is an exercise of the police power. Mechanics' lien laws are not police regulations.

The purpose of a mechanics' lien law is to secure the payment of a debt due either to the original contractor or his sub-contractors, laborers and material men. As stated by Phillips on Mechanics' Liens, Sec. 9, "it is simply a right to charge the property it affects with the payment of a particular debt, in preference and priority to other debts, so far as the statute confers such preference, if all the requisitions of the statute are observed." But as stated by Justice BREWER, 165 U. S., 158: "A mere statute to compel the payment of indebtedness does not come within the scope of police regulations." If mechanics' lien laws do fall within the scope of police regulations, the Ohio law has over-stepped the constitutional limits, for as stated by Justice BREWER, regarding the Texas law above mentioned, "Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained."

Owners of real estate constitute the only class of individuals punished by the mechanics' lien law of Ohio, and they are visited with a penalty not on account of any delinquency of their own, but on account of the delinquency of their original contractors.

Unconstit tional fea not obvia by taking from contracto

It was urged before the Ohio Court in support of the constitutionality of the law and to evade the contention that it leaves the owner of property without protection and deprives him of his property without due process of law, that the

owner may require a bond from the original contractor that all claims against the building shall be paid and that the owner shall be protected against any payment, loss, cost, damage or expense outside of the original contract price. The argument was met by the Court as follows (55 O. S., p. 443):

> "It is further urged that the owner has the means of protecting himself against loss by taking a bond or withholding payments for four months, or collecting his loss from the contractor, and that statutes in restraint of the liberty of contracts are in such cases constitutional. There are cases which so hold, notably *Mallory* v. *La Cross Abbattoir Co.*, 80 Wis., 170. But even in that case it was held that the means of protection must be adequate. It can not be said that the means suggested would be adequate under the statute in question to protect the owner against loss, as he would likely have to pay a higher price in case he should delay payment or require a bond, or undertake to pay for the labor and material himself. And as to collecting from the contractor, there would be no necessity of taking a lien in case of his solvency, and in case of his insolvency, the loss would fall on the owner. *The suggested means of protecting the owner from loss are therefore not sufficient to compensate him for the loss of his liberty to contract to the best advantage, and besides there is no public necessity for singling out owners and laying such heavy burdens upon them for the benefit of a favored class attempted to be created by this statute, and to do so would not be for the general welfare and equal protection and benefit of the people.*"

The Supreme Court of Minnesota, in *Bardwell* v. *Mann*, 48 N. W., 1120, has conceded that if the mechanics' lien law of that State (being a law similar to that of Ohio) is unconstitutional *it could not be rendered valid by the mere fact that the owner could relieve himself by requiring his contractor to give a bond.*

To require the property owner to secure himself by exacting a bond from the original contractor and looking to a

recovery for damages from the original contractor and his bondsmen for injuries sustained, in case he be required by reason of subcontractors' liens to pay in excess of the contract price, is to impose litigation and needless expense on the owner of the property. It compels the owner first to surrender his property to persons with whom he has no contractural relations, to wit: subcontractors, laborers and material-men, and then should he desire to be placed in the condition in which he would have been by the terms of his original contract had it been observed, he is remitted to the uncertainties of a damage suit against the head contractor and his bondsmen. These bondsmen are as sureties favored in law and they stand upon the very letter of their contract. It is proposed to elevate subcontractors and laborers into a favored class at the expense of the property owner. They are to be freed from expense of litigation. They may contract with impunity with any original contractor, and without exercising the prudence which men ordinarily exercise in business transactions. The burden all rests on the property owner.

This question has been touched upon by the Supreme Court of Massachusetts, in *Commonwealth* v. *Perry*, 155 Mass., 117, 31 Am. St., 533, wherein it was held that a statute which provides that "no employer shall impose a fine upon, or withhold the wages, or any part of the wages, of an employe engaged in weaving, for an imperfection that may arise during the process of weaving," is unconstitutional, because if the statute "permit the hiring of weavers only upon terms that prompt payment shall be made of the price of good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the Constitution guarantees to

every one, when it declares that he has a 'natural, essential and unalienable' right of 'acquiring, possessing and protecting property.'" The factory man might sue the careless employe for damages, as might the property owner sue the derelict contractor; the factory man might require every employe to give bond that his work should be free from imperfections, just as the property owner might require a bond from the head contractor that he will construct a building for a given sum and save the owner from payment of anything additional. But in both cases freedom to contract is violated, and a law which compels a resort to such a remedy for protection is unconstitutional.

The contractor, though honest and skillful, may be unwilling or unable to give bond to the owner of the building. The law does not require him to give it, or the owner to demand it. The owner is not required to presume that the contractor is, or will be, dishonest, or that he will not pay his debts incurred in constructing the building. The exacting of a bond may deprive the builder of employment, and the owner the privilege of contracting with the builder he most prefers. It compels the builder in securing a bond to place himself under obligations to others.

Judge SENEY, 9 O. C. C., 710, 711, speaking of the bond feature, says:

> "It is said in answer to this, that Tingle could require the contractor to protect him, by requiring an indemnity bond or surety that he, the contractor, would pay all subcontractors and material-men; but suppose the contractor could not furnish this security, then Tingle for his own protection would be required to contract with some one else which is obnoxious to the principle of a free government. *First, it tends to create a privileged class*, viz.: parties that are enabled to furnish security, and by so doing, tends to monopoly, to the detriment of those not able to so do, and *second, it denies to the owner the right to contract with whom he pleases.* And all for

what purpose—to secure the creditor against a contract he has made with his eyes open, with a person the creditor alone has given credit to and who alone is willing to give the credit, and with whom the owner had nothing to do, and of which he had no knowledge.

It may be urged that the owner, if compelled to pay more than the contract price, may recover *damages* from the original contractor. In other words, the terms of an express contract may be ignored, the owner may be compelled to pay a debt to a man with whom he never contracted, the owner may be compelled to mortgage his property or lose it by a forced sale, and then be remitted to the uncertainty of a damage suit for reimbursement. This is to be done that material-men, laborers, and subcontractors generally, may be favored. The owner in many cases enjoys less opportunity of knowing the financial means of the contractor than do the material-men, because the owner has less opportunity of meeting and knowing the original contractor. In the case of mechanics, and the laboring classes generally (and many of them build homes), persons of small means and unacquainted with business methods—persons without bank connections and a line of credit—to remit them to a damage suit is to bankrupt them. A law driving property owners to such a remedy not only deprives them of freedom to contract, as men in all other positions may do, but is obnoxious to the principle announced in *Commonwealth* v. *Perry*, 155 Mass., 117, *supra*, and other cases announcing the same doctrine.

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If it be contended that the owner may defer the making of payments on his building until the time within which a lien may be taken has elapsed, the answer is that this interferes with the right of contract. It will advance the cost of all building, because cash or short date payments almost always cheapens prices. The argument advanced pre-sup-

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poses that both the original contractor and his subcontractors and material-men and laborers can afford to do a credit business, can afford to wait, and will wait, until the building is completed. It means that if such be not the fact, the original contractor must be a person of such large financial means that he can pay and obtain credit for the whole building and await payment for four months after its entire completion. The argument advanced by the advocates of the law tacitly admits that the law is rank class legislation —discriminating against property owners and all contractors, laborers and material-men of small means.

Equally unsound is the contention that the owner may save himself from loss by seeing to the application of the payments under his contract. This implies that he must constitute himself the guardian of material-men and subcontractors; he must use extraordinary diligence, while they need not use even ordinary care, caution and prudence. He must see that men who are unknown to him and with whom he has no contract, are protected against their own supineness. This devolves a burden on the property owner not placed on any other contracting party, and deprives him of the right to contract except only with reference to a monied consideration.

It is said *the owner* can avoid the harsh features of the law by being *his own builder*. That is to say, he may contract with another to do for him any lawful thing whatsoever except to construct and improve as mentioned in Section 3184, R. S. No matter what the property owner's occupation may be, or how fully his time is engrossed by his own business, or to what extent he may be inconvenienced on account of other cares, or want of knowledge as to the construction of a building, he must, it is suggested, under the Ohio law, to protect himself in acquiring a home, become his own builder. How could a traveling man, an employe

of a shop, many clerks in stores, and large numbers of professional and business men, construct homes for themselves if compelled to give the construction thereof their personal supervision. They would in almost every instance be swindled. They would be subjected to a hardship and burden imposed on no other class of citizens and by an offensive law which has no application as to any other kind of contract.

DECISIONS ON MECHANICS' LIEN LAWS IN HARMONY WITH THAT OF THE SUPREME COURT OF OHIO.

The case of *Palmer & Crawford* v. *Tingle*, was passed on in the Third Circuit, 9 O. C. C., 708. The language of SENEY, C. J., and the reasons assigned by him for declaring the law unconstitutional are so appropriate that we quote at length, as follows:

> "Prior to the enactment of the statute referred to, it was unknown in this State that a liability could be created against a party without his knowledge or consent, or that the Legislature of the State could make contracts for parties or create a liability against them other than such liabilities as might be created by what is known as 'police regulations.' It appears we have been living in the "dark ages," for now we find upon the statute books the following (here follows a quotation of Sec. 3184, R. S.) * * * From this section it will be noticed—
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> 1. "*It has no application to any or all kinds of contracts*, but is limited in the operation to a special class of contracts, viz.: to persons who labor or furnish materials for the objects named in the act. This is certainly a discrimination in favor of and affording protection to a special class of citizens, which is not enjoyed by the citizens of the State in general.
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> 2. "*It places upon the owner of real estate a burden that is not borne by the owner of any other class of property.*
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> 3. "*It denies to the owner of real estate the right to enjoy and possess property, and contract in relation thereto*, as they may deem best, regardless of any 'police regula-

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tion.' As an illustration, suppose in this case, Mr. Tingle could have procured a contractor to have furnished the material and performed the labor at a considerable less price by paying the cash in advance. He could not do so for fear the contractor would not pay his sub-contractor and material men, and he, Tingle, would be compelled to pay the second time, thus denying to Tingle the right to enjoy and possess his property. * * *

4. "*It denies to the owner of real estate the right to contract with reference to his property other than upon a monied consideration.* For illustration, in the case before us, Tingle agreed to pay two notes of $250 each. The contractor, McComb, agreed to accept them. By force of this statute, even if Tingle still had the notes, Tingle would be compelled to pay the plaintiffs or have his property sold to pay them, thus forcing him to pay money where his contract called for the notes. * * *

5. "*It makes the owner of real estate security for the contractors*, the person with whom he contracts, to the extent of defeating him in the enjoyment of his property. Could a more monstrous doctrine be enunciated? Just reflect upon it a minute. One party to a contract, by force of legislation made security that the other contracting party will perform his contract; in effect the owner contracting with himself."

"The principle of constitutional law applies here that no one can be deprived of his property without his consent."

Overton on Liens, Section 536.

Citing *Brown* v. *Sullivan*, 5 Pike (5 Ark.), 221.

"The sub-contractor will be bound by the terms of the contract between the contractor and the owner of the building. Any statute or rule which should in any way deliver him as a workman from the obligation undertaken by his superior, *would at once violate the constitutional provision against laws which would impair the obligation of contracts.* A person making a sub-contract is presumed to make it knowing the agreement of the principal contractor, and to make his in strict subordination to it. But this is held so far only as the owner and contractor have acted openly and in good faith without concealment." Overton on Liens, Sec. 553.

The lien of the material-man and other subcontractors must be determined and controlled by the terms of the original contract, as such lien claimants are conclusively presumed to have made their contracts in accordance with and subordinate to the original agreement.

> "Subcontractors who furnish labor or materials for the erection of a building, are required to take notice of the terms of the principal contract, and the owner is protected in making payments to the principal contractor in accordance with the terms of his contract unless notified of claims for material or labor furnished before such payments are due."
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> *Stewart* v. *Wright*, 52 Iowa, 335.

In deciding the case the Court spoke as to the *constitutionality* of a law which runs counter to the doctrine above announced and in the following language:

> "If one should contract with a builder to erect a house and agree to pay him in advance and comply with his contract by making the payments, *we very much question whether it is within the power of the Legislature to require that he shall be liable to pay for his building twice, by paying off claims of subcontractors who may assert liens after the payments have been made.*"

Michigan and cases

A law similar to that enacted by the Ohio Legislature in 1894, came in review before the Supreme Court of Michigan, in *John Spry Lumber Company* v. *Trust Co.*, 77 Mich., 199. The second section of the Michigan law provided: "Such lien shall not be defeated by any contract, agreement, or understanding between the owner, part owner, or lessee of the real estate upon which such improvements are made or for which such materials are furnished, and the original, or any subcontractor by any payment made by such owner, part owner, or lessee to such contractor or subcontractor, for the contract price of such labor or material (materials) or any part thereof, in case the persons performing such labor or furnishing such material shall comply with the provisions of

this act." Under that law, as in the case of the Ohio Law, "The building contract made with any person, whether man or woman, has no effect on the lien, whether fully performed by the land owner or not."

The law was declared unconstitutional, because "it strikes at the foundations of all property in land. There is no constitutional way for divesting a man's title except by his own act or default. Here his own act is not required and his freedom from default is no defense. He may pay in full, in advance, or otherwise, for all he has contracted for. He may contract for a house built in a certain way, and of certain materials and may have to pay for what he never bargained for, and what his building contractor had no right to put off upon him. The original contract plays no part in the matter excepting as a fact which binds no one and has no significance. Such a gross perversion of all the essential rights of property is so plain that no explanation can make it plainer. * * * In *Hanes & Co.* v. *Wadey*, 73 Mich., 178, the validity of the law was not discussed, as it has not been in any other case hitherto."

The case above quoted was followed in *Mellis* v. *Race*, 78 Mich., 80; *Snell* v. *Race*, 78 Mich., 334, and in *Waters* v. *Wolf*, 162 Pa. St., 153, 170.

In passing on the Minnesota Mechanics Lien Law, enacted in 1887, which made the lien of a mechanic or laborer, prior to that of any other incumbrance, and provided that a failure of the owner to enjoin a person furnishing labor or material for a building should be conclusive evidence that it was furnished with the owner's consent, MITCHELL, J., in the case of *Meyer* v. *Berlandi*, 39 Minn., 438, 442, 12 Am. St. 663, 666, said:

> "As liens are an incumbrance upon the owner's property it is fundamental that they can only be created by his consent or authority. No man can be deprived of his property without his consent or by due process of law.

The basis of the right to enforce a claim, as a lien against property, is the consent of the owner, and it is upon this principle alone that laws giving liens to subcontractors are sustained. The contract of the owner with the contractor is, under the law, the evidence of the authority of the latter to charge the property with liabilities incurred by him in performing his contract. *O'Neil* v. *St. Olaf's School*, 26 Minn., 329; *Laird* v. *Moonan*, 32 Minn., 358."

In the same case he further said (p. 670, 12 Am. St.): "No one can be deprived of his property without his consent except for public use, nor without due compensation first being made. Overton on Liens, Sec. 536. *Brown* v. *Morison*, 5 Ark., 217. *Croskey* v. *Northwestern Mfg. Co.*, 48 Ill., 481."

We submit that the reasoning in the dissenting opinion of CASSODAY, J., in *Mallory* v. *LaCrosse Abattoir Co.*, 80 Wis., 182, is better than that of the majority of the Court who held a law like that of Ohio constitutional. Judge CASSODAY said:

"The act enables the contractor to limit his own duties, obligations, and liabilites by contract, and at the same time enables him, through the agency of a subcontractor, to bind the owner, without limitation, for all materials and labor that go into the structure. The subcontractor is not even limited to the specifications contained in the original contract, for by the terms of the act he may compel the owner to pay for what he never contracted for. It not only makes the owner, without his consent, responsible for the contractor's contracts with subcontractors, but also for his frauds. It authorizes the subcontractor to compel the owner to pay the contractor's debts after he has, without notice of any adverse claim, paid to the contractor the whole contract price to enable him to pay his own debts. It does not in terms prohibit the owner from paying in advance or paying without notice, but precludes him, as against a subcontractor, from the benefit of such payment. It authorizes the contractor, after the making of the con-

Law overthrows rules of agency.

> tract, to do what the Legislature could not then do; that is, to change the terms of his contract without the consent of the owner, and hence to impair its obligations."

In *Selma Sash, Door and Blind Factory* v. *Stoddard*, 116 Ala., 251, a law similar to that of Ohio was declarad unconstitutional on a demurrer to the bill filed by the complainant. The Alabama act declared a prior lien in favor of a subcontractor to the extent of his claim, not exceeding the entire amount agreed to be paid the original contractor merely on the presentation of his claim to the owner of the premises within thirty days after the completion of the building, without regard to the terms of the original contract for the construction of the building, and whether notice of his claim had been given by the material-man or not. There was no provision in the act which required notice, in fact or constructively, to be given to the owner. It mattered not what the terms for the construction of the building were, nor how much may have been previously paid in good faith on the contract with the original contractor, nor as to the balance due the contractor, nor that the owner had no notice or knowledge of the claim for materials furnished, or the claim of the subcontractor. By the terms of the act, if the subcontractor presented to the owner within thirty days after the completion of the building his claim for materials, or labor, and brought suit within nine months, it was sufficient to give a lien for his entire claim, provided it did not exceed the whole amount agreed to be paid for the construction and completion of the building. The Court disposed of the contention in that case by saying:

> "In *Randolph* v. *Builders & Painters Supply Co.*, 106 Ala., 501, in considering the sixth section of the mechanics' and material-men's statute (Acts of 1890–91, p. 578), we used the following language: "The 6th section of the act provides, 'That the fact the person

performing labor or furnishing materials was not notified in writing not to perform such labor or furnish such materials, by the person in whom the title was invested, at the time such labor was performed or materials furnished, shall be *prima facie* evidence that it was by and with the consent of the owner that such labor was performed and materials furnished.' This is a substantial copy of Section 5 of the Minnesota statute of 1887, except that their statute made the failure to enjoin the party not to furnish materials, conclusive evidence that it was done with the consent of the owner. Of this section, the Supreme Court of that State, in *Meyer* v. *Burlandi*, *supra*, says: 'Section 5 is also unconstitutional. As liens are an incumbrance upon the owner's property, it is fundamental that they can only be created by his consent or authority. No man can be deprived of his property without his consent, or due process of law. The basis of a right to enforce a claim, as a lien against property, is the consent of the owner, and it is upon this principle, alone, that laws giving liens to subcontractors are sustained. The contract of the owner with the contractor is, under the law, the evidence of the authority of the latter to charge the property with liabilities incurred by him in performing his contract.' *O'Neil* v. *St. Olaf*, 26 Minn., 329; *Laird* v. *Moonan*, 32 Minn., 358; *Eufaula Water Co.* v. *Addyston*, *Pipe & Steel Co.*, 89 Ala., 555; *Copeland* v. *Kehoe*, 67 Ala., 597. It is not denied, the legislature may establish proper rules of evidence, but not to the extent of depriving one of his property without due process of law; nor is it denied, that the owner's contract is made under and subject to the provisions of the existing lien law, provided these provisions do not infringe his constitutional rights. But, suppose the owner contracts with another to erect a house, or to do any of the many things for which a lien is given under section two of this act, and he has paid, as required by section two and a half, and the work is not completed, and the contractor who is still under obligation to complete the work, and is liable for not doing so, goes forward to complete it, with labor and materials, provided on his own responsibility, without the procurement of the owner, or his having in any way obligated himself for it, having performed

Lien can be created only by owner's consent or authority.

Invalid Rule of Evidence.

his entire obligation under the law to the contractor, subcontractors and material-men, can it be maintained on any principle of right guaranteed to us, that the owner shall be held liable, without his own consent, for all that is done by the contractor in the completion of his contract? Is he required to notify subcontractors and material-men in writing, not to come on his premises, and not to aid the contractor in performing his duty? How could he even hold his contractor liable for a breach of his contract, when the latter was able and willing, even, to perform it, if he should notify the contractor's laborers and material-men in writing not to perform such labor or furnish such materials?' The section goes too far. It overreaches itself, in an effort to protect the subcontractors and material-men, at the expense of the owner, and gives them an advantage over him, which is not right or mutual. While the owner should be just toward such parties, they ought to be just to him. The law should not constitute him their guardian, without their request, and hold him liable for things he never engaged to become responsible for by contract, express or implied, in any just or fair sense." See, also, *May* v. *McConnell*, 102 Ala., 577, 580. * * * * * * "A subcontractor or material-man must take notice of the terms and character of the contract between the owner and the original contractor, and the legislature has no power to authorize a contractor to change the terms of his contract with the owner, and impose additional liabilities upon him and liens upon his land by any agreement with other parties to which the owner was not a party, of which he has no notice, and there is no provision by which he can acquire such notice or information. The statute is clearly unconstitutional and void."

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Renton v. *Conley*, 49 Cal., 185, 187, involved a law similar to that of Ohio. The material-man had furnished lumber to the contractor. No express agency was averred. The only agency relied on was the implied agency created by the statute. It was not alleged that any part of the contract price for the building remained unpaid from the owner to the contractor at the time of recording the notice of lien.

It was claimed that the material-man's lien was valid, irrespective of the fact that the owner when he first had actual or constructive notice of the lien may have paid to the contractor the full contract price when and as it became due under the contract. The law contained no provision limiting the lien to the amount which might be owing from the owner to the contractor under the contract, even though the materials were furnished at the instance of the contractor alone. Under the act and as claimed by the complainant, the property of the owner was liable for the lien regardless of the claim of the contractor against the owner of the building. The Court, however, held that where the owner had made payments to the contractor in good faith under and in pursuance of the contract before receiving notice either actual or constructive, of the liens of material-men and laborers, the building could not be charged with liens exceeding the balance of the contract price remaining unpaid when notice of a lien was given.

The same principle is announced in *McAlpine* v. *Duncan*, 16 Cal., 127, and *Bowen* v. *Aubrey*, 22 Cal., 571. The California cases are digested in note to *French* v. *Bauer*, 20 L. R. A., 561, 562.

> "A subcontractor cannot file a mechanic's lien where the written contract of the principal contractor with the owner contains the following stipulation: 'The contractor agrees that no liens shall be filed against said works, or on account of the said contractor, neither shall there be any legal or lawful claims against the contractor in any manner from any source whatever for work or materials furnished on said works.'
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> "The first section of the act of June 8, 1891, P. L., 225, which requires the written consent of the subcontractor in order to bind him by a stipulation in the contract between the original contractor and owner, that no mechanics' liens shall be filed, *is unconstitutional in that it attempts to create a debt and give a lien therefor, against the express covenant in the contract;* and the

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second section of the act, providing that the contractor shall be the agent of the owner in ordering work or materials, and that any subcontractor doing work or furnishing materials shall be entitled to a lien, notwithstanding any stipulations to the contrary in the contract between the owner and the contractor, unless such stipulation shall be consented to by said contractor, is unconstitutional in that it attempts to frame a new contract and substitute it for the one made by the parties.

"The indefeasible right to acquire and possess property, secured by Article I., Section 1, of the Constitution of Pennsylvania, necessarily includes the right to make reasonable contracts for the improvement of property, and a contract that no mechanics' liens shall be filed is not unreasonable as to either contractor or subcontractor. Such interference with the indefeasible rights of freedom of contract in the acquisition and protection of property as is attempted by the second section of the above act, the people have plainly reserved from legislative power.

"Whatever reasonable regulations the Legislature might make as to notice to subcontractors and materialmen of the terms of the contract between the owner and the only one with whom he bargains, the principal contractor, such as that it shall be in writing and shall be recorded, would be clearly within legislative power."

Waters v. *Wolf, Exrx.*, 162 Pa. St., 153.

The case of *Henry* v. *Rice*, 18 Mo., App., 497, is an instructive one. From the opinion rendered therein it appears that "the first secton of the mechanics' lien law (Sec. 3172, R. S.) gives to every mechanic or other person, who shall do any work upon or furnish any material for any building, etc., under or by virtue of any contract with the owner, or his agent, contractor or subcontractor, a lien upon such building."

The owner of the building had in that case paid the full amount of the contract price. A suit was brought against her property on a mechanics' lien, and it was held:

"Where in a suit by a material-man to enforce the statutory lien for materials furnished to a contractor for a building, against the property, it was pleaded by the owner, and established by the proof, that under and pursuant to the owners' contract with the contractor, she fully paid him the whole contract price for the building, every dollar of which was applied to the liquidation of claims for work and materials thereabouts; and did so in good faith and without any knowledge whatever of the existence of plaintiffs' demand. *Held*, that the contractor himself could not enforce a lien beyond the contract price, and that the subcontractor or material-man, can occupy in this respect, no better position. That he who deals with a special agent, must take notice of the extent of his authority and the limitations upon his office. That the basis for the lien given by the statute against the property owner is the principle of substitution, and the party substituted by operation of law could occupy no better position than he for whom he is substituted. That there is created by the statute, a privity between a subcontractor and contractor, and the subcontractor, is in law, presumed to have notice of the terms of the contract between the owner and the contractor and the looking to the building, and not to the contractor's credit is an admission of knowledge of the contract relation between the owner and contractor. *Held*, further, that if the owner paid the contractor in full the contract price, in good faith, without knowledge of the plaintiff's demand and that the money so paid went to the satisfaction of claims for work done and materials furnished on the building, it is, in legal effect, the same as if the owner had paid the contract money directly for the work and materials to the subordinates, and that her property cannot be subjected to the plaintiffs' demand for the excess. *Garnett* v. *Berry*, 3 Mo., App., 205."

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In commenting on Sec. 3172, above mentioned, it was said by PHILLIPS, P. J. (pp. 509, 510):

"It must be admitted that this language is quite broad. But it should receive such construction as, while upholding its true object and preserving its spirit, yet,

would not allow it to become an intolerable oppression, or to impinge upon deep-rooted principles of universal justice, or to strike down the inviolability of property rights, against the consent of the owner. No Court has as yet exhibited the temerity to assert that the contractor himself could enforce a lien for one dollar's worth of work or material beyond his contract price. By the express provision of the statute, his right to the lien depends and rests upon the existence of a *contract* between him and the property owner. That his subcontractor, who never saw nor communicated with the owner, can occupy in this respect a better position than the principal contractor, must strike the judicial mind as violative of every principle of recognized law and every dictate of justice. Such a right cannot stand on the doctrine of principal and agency. *Deardorff* v. *Everhartt*, 74 Mo., 37. He who deals with a special agent must take notice of the extent of his authority and the limitations upon his office."

We are not, however, remitted solely to decisions on mechanics' lien laws for support of our position.

OTHER DECISIONS INVOLVING THE SAME PRINCIPLE.

Inheritance tax levied on estate.

State v. *Ferris*, 53 O. S., 314, 34 Bull, 203, involved the constitutionality of the law imposing a direct inheritance tax. That law exempted from taxation the right to receive or succeed to estates not exceeding twenty thousand dollars in value, and taxed the sole right of receiving or succeeding to estates which exceed that sum in value. It also taxed at a higher rate percentum the right to receive or to succeed to estates of a larger value than to estates of a smaller value. The law was held unconstitutional as contravening Section 2 of the Bill of Rights of the Constitution of Ohio, and the Fourteenth Amendment to the Constitution of the United States.

Says BURKET, J., 53 O. S., 336:

> "If government is instituted for the equal protection and benefit of the people, it follows that laws which are passed under government so instituted, must likewise be for the equal protection and benefit of the people. This statute fails to protect equally the people who exercise the right and privilege of receiving or succeeding to property."

In *Gulf, Colorado & Santa Fe R. R. Co.* v. *Ellis*, 165 U. S., 150, the Supreme Court of the United States passed on an act of the Texas Legislature which provides that any person in that State having a valid *bona fide* claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railroad company, provided such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock is killed or injured, against any railway corporation operating a railroad in such State, and the amount of the claim does not exceed fifty dollars, may present a verified claim for payment to such corporation and file it with any station agent thereof in any county where suit may be instituted for the same, and if such claim be not paid or satisfied within thirty days after the filing thereof, suit may be immediately instituted thereon in a proper court, and if such claim be established and judgment be obtained for the full amount thereof as presented for payment to such corporation, the party so presenting such claim shall be entitled to recover the amount thereof and all costs of suit, and in addition thereto all reasonable attorney fees not to exceed ten dollars, to be assessed and awarded by the Court or jury trying the issue, provided always an attorney be employed in the case. The law was held unconstitutional because it operated to deprive the railroad companies of property without due process of law, and denies to them

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the equal protection of the law, in that it singles them out of all citizens and corporations and requires them to pay in certain cases attorneys' fees to the parties successfully suing them, while it gives to them no like or corporation benefit. It was further held:

> "The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th amendment, and in all cases it must appear, not merely that a classification has been made, but also that it is based upon some reasonable ground—something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection."

The principle involved in this Federal case is the same as that passed on in *Coal Co.* v. *Rosser*, 53 O. S., 12, 34, Bull., 108. Judge BREWER in his decision cited and approved the doctrine in the following cases:—

State v. *Loomis*, 115 Mo., 307, 314; *S. & N. Ala. R. R. Co.* v. *Morris*, 65 Ala., 193–9; *Wilder* v. *The Chicago & West Mich. Railway*, 70 Mich., 382; *Atchinson & Neb. R. R. Co.* v. *Beatty*, 6 Neb., 37; *Millett* v. *People*, 117 Ill., 294; *Braceville Coal Co.* v. *People*, 147 Ill., 66; *Durkee* v. *City of Janesville*, 28 Wis., 464; *State* v. *Fire Creek Coal & Coke Co.*, 33 W Va., 188 (all of which cases are cited and followed by the Supreme Court of Ohio in the Rosser case); also *State* v. *Goodwill*, 33 W. Va., 179, and *Frorer* v. *People*, 141 Ill., 171, which cases are cited and followed by the Supreme Court of Ohio in *Young* v. *The Lion Hardware Co.*

The doctrine of the Ohio Court is therefore identical with that announced by the Supreme Court of the United States.

The *Hocking Valley Coal Co.* v. *Rosser*, 53 O. S., 12, 34 Bull., 108, involved the validity of Sec. 6563*a*, R. S. of Ohio. That section provides that if a person to whom wages be due demand his wages in writing, and they be not paid within three days after such demand, and a suit be brought

therefor, if a recovery be had, as claimed in the Bill of Particulars, the judgment shall include, not only the amount claimed, but an attorney fee not in excess of five dollars, to be paid to the plaintiff's attorneys. If the defendant appeal from such judgment, and the plaintiff on appeal recover in the higher Court, a like sum, exclusive of interest, there shall be included in costs an additional fee, not in excess of fifteen dollars, for the plaintiff's attorney, as the Court may allow.

In holding the law unconstitutional because it contravenes Sections one and two of the Bill of Rights, it was said: "Upon what principle can a rule of law rest which permits one party, or class of people, to invoke the action of our tribunals of justice at will, while the other party, or another class of citizens, does so at the peril of being mulct in an attorney fee if an honest, but unsuccessful defense should be interposed. A statute that imposes this restriction upon one citizen, or class of citizens, only, denies to him or them the equal protection of the law.

"It is true that no provision of the Constitution of 1851 declares in direct and express terms that this may not be done, but, nevertheless, it violates the fundamental principles upon which our government rests as they are enunciated and declared by that instrument in the Bill of Rights."

In the case of *Ritchie* v. *The People*, 155 Ill., 98, the Supreme Court of that State held a law unconstitutional which prohibited the employment of females in a factory or work-shop for more than eight hours a day on the ground that it run counter to the constitutional provision that no person shall be deprived of life, liberty or property without due process of law, substituted the legislative judgment for that of the employer and employe in matters about which they were competent to contract with each other, unreasonably interfered with the rights of citizens to enter into con-

tracts, and was class legislation in that it imposed an unreasonable burden upon one citizen or class of citizens, although it was applicable to all other classes of citizens. The syllabus of the case is as follows:

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"The right to labor or employ labor, and make contracts in respect thereto, upon such terms as may be agreed upon, is both a liberty and property right, and is included in the guaranty of Section 2, Article 2, of the Constitution, that no person shall be deprived of life, liberty, or property without due process of law.

"While the right to contract may be subject to limitations growing out of the duties which the individual owes to society, the power of the legislature to limit such right must rest upon some reasonable basis, and cannot be arbitrarily exercised.

"The act of 1893, prohibiting the employment of females in any factory or workshop for more than eight hours a day, is unconstitutional, as being partial and discriminating in its character, whether applying only to manufacturers of wearing apparel or to manufacturers generally.

"Such a statute is also unconstitutional as an arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties, and a substitution of the legislative judgment for that of the employer and employee in a matter about which they are competent to agree with each other.

"*The Legislature, in imposing an unreasonable burden upon any one citizen or class of citizens, transcends the authority entrusted to it by the Constitution, although it imposes the same burden upon all other citizens.*"

The following language, employed by MAGRUDER, J., in deciding the case is fitting:

"The privilege of contracting is both a liberty and property right. (*Frorer* v. *The People*, 141 Ill., 171). Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts. (*The State* v. *Loomis*, 115 Mo., 307.) The right to use, buy, and sell property and contract in respect thereto, is protected by the constitution. * * * *In*

this country the Legislature has no power to prevent persons who are sui juris from making their own contracts, nor can it interfere with the freedom of contract between the workman and the employer. The right to labor, or employ labor, and make contracts in respect thereto upon such terms as may be agreed upon between the parties, is included in the constitutional guaranty above quoted. (*State* v. *Goodwill*, 33 W. Va., 179; *Godcharles* v. *Wigeman*, 113 Pa. St., 431; *Braceville Coal Co.* v. *The People*, 147 Ill., 66). The protection of property is one of the objects for which free governments are instituted among men. (Const. of Ill., Art. 2, Sec. 1.) The right to acquire, possess, and protect property includes the right to make reasonable contracts. *Commonwealth* v. *Perry*, 155 Mass., 117.) *And when an owner is deprived of one of the attributes of property, like the right to make contracts, he is deprived of his property within the meaning of the constitution.* (Matter of Application of Jacobs, 98 N. Y., 98.) * * * The right to contract is the only way by which a person can rightfully acquire property by his own labor. 'Of all the rights of persons, it is the most essential to human happiness.' (*Leep* v. *St. L. I. M. & S. Ry. Co.*, 58 Ark., 407.) * * * The 'law of the land' is 'general public law binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals.' (*Millett* v. *The People*, 117, 294.) The 'law of the land' is the opposite of 'arbitrary, unequal and partial legislation.' (*The State* v. *Loomis*, *supra.*) The Legislature has no right to deprive one class of persons of privileges allowed to other persons under like conditions. The man, who is forbidden to acquire and enjoy property in the same manner in which the rest of the community is permitted to acquire and enjoy it, is deprived of liberty in particulars of primary importance to his pursuit of happiness. *If one man is denied the right to contract as he has hitherto done under the law, and as others are still allowed to do by the law, he is deprived of both liberty and property to the extent to which he is thus deprived of such right.* In line with these principles, it has been held that it is not competent, under the constitution, for the Legislature to single out owners and employers of a particular class,

and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which other owners or employers are permitted to make (*Millett* v. *The People, supra; Frorer* v. *The People, supra: Ramsey* v. *The People*, 142 Ill., 380)."

"When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, to society, or government, and the parties are capable of contracting, there is no condition existing upon which the Legislature can interfere for the purpose of prohibiting the contract, or controlling the terms thereof."

Leep v. *St. L. I. M. & S. Ry. Co.*, 58 Ark., 407, 421.

"*Right to contract is both a liberty and property right.* If any person is denied the right to contract and acquire property in the manner in which he has hitherto enjoyed under the law, and which others are still allowed by the law to enjoy, he is deprived of both the constitutional right of liberty and property, to the extent that he is thus denied the right to contract.

"General laws may render that unlawful in many cases which has, prior thereto, been lawful, but laws depriving particular persons or classes of persons, of rights enjoyed by the community at large, to be valid must be based upon some existing distinction or reason not applicable to others not included within its provisions.

"A law singling out persons, corporations, or associations, engaged in any particular business, and depriving them of the right to contract as persons, corporations, or associations, engaged in other business may lawfully do, is unconstitutional and void.

"*The right to contract granted a corporation by its charter includes the right to fix the price at which labor for it will be performed, and the mode and time of payment.* Each is an essential element of the right to contract, and a restriction as to either, as it is enjoyed by the community at large, is an abridgment of the constitutional right of liberty and property."

Braceville Coal Co. v. *People*, 147 Ill., 66, 37 Am. St., 206.

The Legislature has attempted to say to the property owner, you may contract with the manufacturer to build you a buggy, or wagon, or reaper, or with a tenant to cultivate your farm and raise a crop, or with a railway company to transport your produce or live stock, and may fix the price you shall pay for the article or service rendered, beyond which amount you shall not be liable. You may delegate authority to your agent in person or through others to purchase produce, or grain, or merchandise, or any commodity at a given price, or to perform any act for you except to improve your property, and limit his authority, and escape liability if he or his representatives exceed the powers granted him; but if you build or improve your property, you shall not fix the limit beyond which your liability ceases. The farmer, the merchant and manufacturer may make contracts specifying a consideration beyond which amount no liability attaches, but the unfortunate owner of real estate who builds a house or improves his property to make it productive cannot make a contract in which he may limit his expenditures.

Law applies to manufacturers.

In *Godcharles* v. *Wigeman*, 113 Pa. St., 431, a puddler had received orders from his employers, the defendants, for coal and other articles, which orders were honored by the parties on whom they were drawn and paid by the defendants on presentation. Notwithstanding this fact the plaintiff brought suit against the defendants for his wages under a statute which made all orders given by employers engaged in the business of manufacturing, to their workmen, payable in goods or anything but money, void. In speaking of the sections of the act the Court, p. 437, said:

> They "are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what in this country cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the

> right of the employer and employe. * * * * He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing, is an infringement of his constitutional privileges, and consequently vicious and void."

If the iron or coal man may make his own contracts and determine the manner and medium of payment and the value of the services to be rendered, why may not the real estate owner, desirous of improving his property, exercise the same right.

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A law similar to that of Pennsylvania above mentioned, was passed on in *State* v. *Goodwill*, 33 W. Va., 179, 25 Am. St., 863, 869: "It is not competent," says the Court, "for the legislature, under the constitution, to single out owners and operators of coal mines, and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make." That is to say, if the contract made between an owner of real estate and an original contractor does not limit the powers and rights of the contractor and his subcontractors when in all other cases the powers and rights of parties are circumscribed by the contract, the legislature has singled out a certain class and imposed on them a risk and burden which is not borne by men in any other situation.

In *State* v. *F. C. Coal Company*, 33 W. Va., 188, the Court held a law to be unconstitutional which prohibited persons and corporations engaged in mining and manufacturing, and interested in selling merchandise and supplies, from selling the same to their employes at a greater per cent or profit than they sell to others not employed by them, because it was class legislation, and an unjust interference with private contracts and business.

Laws appl to barbers

A Statute of Illinois made it unlawful for barbers to do business on Sunday without including any other class of business. Merchants and their clerks, restaurant keepers and their employes, clothing house proprietors, blacksmiths, livery stable keepers, owners of street car lines, and people engaged in every other branch of business, were permitted to open their respective places of business on Sunday and transact their ordinary business, but the barber, and he alone, was required to close his place of business. In passing on the validity of the statute, it was held (*Eden* v. *People*, 161 Ill., 296, 32 L. R. A., 659): "A barber is deprived of property without due process of law, by a statute making it unlawful for him to do business on Sunday, while it does not apply to any other class of business."

A similar law was declared unconstitutional and void in *Ex parte Jentzsch*, 112 Cal., 468, 32 L. R. A., 664, because it was "an undue restraint of personal liberty, and is special legislation, based upon an arbitrary classification, and not a proper exercise of the police power." As stated in that case, p. 666: "A law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate only upon a class, and not generally upon all." And this is the doctrine of the 165 U. S., 150.

> "The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, and the mass of the community and those who make the law, by another; whereas, a like general law, affecting the whole community equally, could not have been enacted. *Wally* v. *Kennedy*, 2 Yerg., 554."
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> *State* v. *Goodwill*, 33 W. Va., 182.

THE MECHANICS' LIEN LAW OF OHIO DEPRIVES THE OWNER OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW.

Our contention on this point is sustained by many of the cases above cited. The law in question is not applicable to or binding on all members of the community under all circumstances. It is limited to property owners who build.

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The phrases, "due process of law," and "the law of the land," are synonymous and used interchangeably. Cooley's Cons. Lim., (3d Ed.), Sec. 353; *Millett* v. *People*, 117 Ill., 294. The phrase "due process of law," means "that every citizen shall hold his life, liberty, property and immunities under the protection of the *general* rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land." Cooley's Cons. Lim., (3d Ed.), Sec. 353. In *Millett* v. *People*, 117 Ill., 294, 301, it is said of this phrase that it "means general public law, binding upon all the members of the community under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals." Such general public law must be founded on reason. *Harding* v. *People*, 160 Ill., 459. The privilege of contracting being a liberty and a property right, no one can be deprived of it without due process of law. *Ritchie* v. *People*, 155 Ill., 98 *supra*.

The fact that the property owner may refuse payment of a subcontractor's lien until compelled to pay by judicial inquiry, does not relieve the law of its obnoxious features, for the reason the statute gives a lien for the amount of the laborer's, subcontractor's and material-man's claim without any subsisting contract between him and the owner, and without notice to the owner. The effect of a judicial inquiry could only be to require proof of the amount of the claim. Recovery is wholly independent of the state of

account between the property owner and the original contractor.

As CASSODY, Judge, said in his dissenting opinion in *Mallory* v. *LaCrosse Abattoir Co.*, 80 Wis., 183: "It seems to me that a man can not reasonably be said to have due process of law, and equal protection of the laws, under an act which enables his contractor to bind him conclusively without his consent or knowledge and contrary to the express terms of their written contract, and merely permits him when sued thereon to answer to the effect that by the terms of the contract he has become so bound, and was unable to prevent it. On the contrary, before any conclusive statutory liability should be imposed upon any person, he should be guilty of some tort, or give his consent, or be in default, or have such notice as would enable him to protect himself against gross injustice, otherwise the creation of such liability is an arbitrary and unjustifiable imposition."

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The law is obnoxious to the constitution because it renders the property owner liable whether negligent or not, and whether or not he has knowledge of the failure of the original contractor to pay his liabilities, and regardless of whether or not the owner was at fault or had knowledge of the original contractors.

Jolliffe v. *Brown*, 14 Wash., 155, 158.

The law singles out and imposes restrictions on one class of people in the making of contracts, while all other classes are permitted to contract freely in their different pursuits. Conceding, for the sake of argument, the right of the legislature to pass a law, making all contracting parties liable on their contracts beyond the amount of the contract price and regardless of the same, yet, under the Constitution the restrictions must be imposed alike upon all residents of the State.or the effect of the law would be to grant privileges

and immunities upon one class of citizens which do not equally belong to all. If the law is valid the legislature would have the right to render farmers, merchants, manufacturers and any other class or classes, liable beyond the amount of their contracts and regardless of the same, to subject nine-tenths of the people, for instance, to laws of this discriminating character, and leave the remaining one-tenth to contract freely as at present.

Tacoma v. *Krech*, 15 Wash., 296.

"Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied to all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free government."

Cooley's Const. Lim., sec. 391–2.

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"The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended—like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act will transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such a manner as should be permitted to the community at large, would be to deprive them of *liberty* in particulars of primary importance to their 'pursuit of happiness.'"

Cooley's Const. Lim., [3d Ed.] Sec. 393.

In the case of *Barbbier* v. *Connelly*, 113 U. S., 27-31, Mr. Justice FIELD says:

"The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens could be laid upon one than are laid upon others in the same calling and condition."

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"In judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, *or none of these;* and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.'"

Davidson v. *New Orleans*, 96 U. S., 107. Justice BRADLEY'S opinion;

Ky. Railroad Cases, 115 U. S., 321. Justice MATTHEWS' opinion.

Judge CASSODY, in his dissenting opinion on the mechanics' lien law of Wisconsin, 80 Wis., 186, after making the two quotations last above given, said this:

"To authorize A, through the agency of a subcontractor, to impose an arbitrary, unjust, and absolute liability upon B, without his default, and contrary to

the express stipulations in the written agreement between them, and without any notice that will enable him to protect himself against such liability, and without his violating any statute or any law, or committing any tort or wrong, is certainly to deprive B of his property or rights of property, without due process of law, and to deprive him of the equal protection of the laws. *King* v. *Hayes*, 80 Me., 206; *Ulman* v. *Mayor*, 72 Md., 587; *Garvin* v. *Daussman*, 114 Ind., 429; *Ore. R. & N. Co.* v. *Smalley*, 1 Wash., 206."

The laborer, material-man or subcontractor may delay taking his lien for four months after the completion of his work or the furnishing of his material, and until the owner shall have fully paid for his material and thus assert and successfully maintain his lien. Due process requires notice and an opportunity to be heard.

Peerce v. *Kitzmiller*, 19 W. Va., 564.

Burns v. *Multnomah R. R. Co.*, 8 Sawyer, 543.

Garvin v. *Daussman*, 114 Ind., 429.

Kuntz v. *Sumption*, 2 L. R. A., 655 (Ind.).

"Whatever the character of the proceeding by which one is deprived of his property, whether judicial or administrative, and whether it takes the property directly or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceedings will want the essential ingredient of due process of law."

The Railroad Tax Cases, 13 Fed., 722, par. 7, Syl.

THE MECHANICS' LIEN LAW OF OHIO IS CLASS LEGISLATION.

We shall refer but briefly to this point as many of the cases heretofore cited characterize enactments of this character as Class Legislation. The law is conspicuously favorable to such contractors; it is peculiarly severe on those financially weak. It deprives the weak from competing with the strong. If the owner is compelled to look to a bond for protection, the poor contractor, no matter how honest he may be, is discriminated against in favor of the rich. He is not given a fair chance of earning a livelihood. *Such a law is legislation in favor of the rich.*

Judge BURKETT, in the *Palmer & Crawford* case, 36 Bull., 319, 55 O. S., 444, in speaking of this feature of the case, said:

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> "It is also urged by the friends of the statute, that it is beneficial in this, that it drives all the small and insolvent contractors out of business, and leaves the contracting business in the hands of those who are rich enough to guarantee their contracts. But it is not for the general welfare that small and financially weak contractors should be driven out of business. As well might poor laborers and small furnishers be driven out of business and thus leave the whole business of building and furnishing to the rich, and give them a monopoly of the whole trade, and drive the weak and poor into starvation. *Liberty and the common welfare demand that all rich and poor alike should have an equal chance, and be treated alike, and laws should be enacted for their equal protection and benefit.*
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> "With liberty and the equal protection of the laws, the weak and poor of to-day become the rich and influential of the future. And it is a narrow, unworthy, and unpatriotic policy to attempt to drive the poor and weak out of business for the benefit of the rich and influential."

Such a result is the denial of liberty to a class of citizens who appeal strongest to our sympathies; for

> "Liberty, in its broad sense as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful avocation. These principles are contained and stated in the above language in various cases, among which are *Livestock Assn.* v. *Crescent City, &c., Co.*, 1 Abb., 388, 398; *Slaughter Houses Cases*, 16 Wallace, 36, 106; *Matter of Jacobs*, 98 N. Y., 98, 50 Ap. Rep., 636; *Berthold* v. *O'Reilly*, 74 N. Y., 509, 30 Am. Rep., 323; *People* v. *Marx*, 99 N. Y., 377, 52 Am. Rep., 34."
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> *People* v. *Gillson*, 109 N. Y., 389, 4 Am. St., 468.

A law which discriminates in favor of the rich and against the poor is no part of the law of the land. The law of the land is binding upon every member of the community under similar circumstances.

> *Wally's Heirs* v. *Kennedy*, 2 Yerg., 554.
> *State* v. *Loomis*, 115 Mo., 313.

The mechanics' lien law confers on material men and laborers a privilege enjoyed by no other classes. In no other instance are subcontractors able to demand and obtain more from one contracting for a given article than the person contracting therefor agreed to pay. In no other instance can a subcontractor compel payment from one with whom he has no contract, and in excess of the amount stipulated in the original contract.

> "It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances; or that one should be subject to losses, damages, suits, or actions, from which all others, under like circumstances, are exempted.
>
> *Holden* v. *James*, 11 Mass., 396 (6 Am. Dec., 174, 178).
> *South* v. *North Ala. R. R. Co.* v. *Morris*, 65 Ala., 194, 199.

"Special privileges are always obnoxious, and discriminations against persons or classes are still more so."

Cooley's Const. Lim. (3d Ed.), Sec. 393.

To prove that the Mechanics' Lien Law is not class legislation, reference was made below to the law relating to bankers, traders, minors, married women, &c.

The fact that laws are enacted controlling in a measure the business of bankers, and traders, or applying to minors and married women only, or granting exemptions in favor of heads of families, or exempting portions of the earnings of laborers, or giving a landlord a lien on his tenant's crops, does not justify such a mechanics' lien law as that of Ohio.

Laws re to bank minors, ried wo etc., un mechan lien law

Cooley's Const. Lim. (3d Ed.), Secs. 39, and 390.

Laws affecting bankers and traders are for the benefit and protection of all the people. The whole commercial and labor world depends on the care and correct management of bankers. Laws applicable to minors and married women are based on a different principle from laws justifying mechanics' liens. Married women were at common law, under many disabilities which placed them in much the same position as minors, and for the husbanding of their property, and for their proper sustenance, support and protection, it was found necessary to care for them. The exemption in favor of heads of families applies to every person who has a family for the protection of the home. So the exemption of a portion of the earnings of a laborer is likewise for the protection of the family and it is for the benefit of the whole people that they should be protected sufficiently to prevent them from becoming a charge on the State or objects of charity. No such reasons exist for the enactment of a mechanics' lien law like the one in question. Under a law which secures to the mechanic and material-man a derivative

lien, they may, if they desire, know the very terms of the original contractor's lien and contract with him or not, as they choose. Their knowledge of the cost of building is almost invariably greater than that of the owner. The privilege accorded them of filing an affidavit with the owner before furnishing any labor or material, reciting that they are about to furnish the same, and thus stopping the payment of money to the original contractor, affords them an ample remedy, unless they make a foolish contract, and at the same time enables the owner to protect himself.

THE CLAIM THAT THE USE OF THE LABOR AND MATERIALS CREATES THE LIEN.

It is said by advocates of the law that the use of the materials and work on the property owner's premises, the putting of them into the building and improving the property gives the lien to the subcontractor or laborer for their value; that the law prevents collusion between the owner and head contractor, and prevents loss to innocent parties by reason of low contracts made by property owners with dishonest and irresponsible contractors.

Parties desiring to build rarely contract knowingly with dishonest and irresponsible parties. Beside it has not yet been shown that material-men and subcontractors are more honest than head-contractors. The owner of property under the law is left to the mercy of dishonest conniving head-contractors and subcontractors.

The taking of the mechanics' lien operates like a proceeding in attachment.

Copeland v. *Manton*, 22 O. S., 398.

In both cases the claim of the debtor is subjected to the payment of his debt. Suppose A. says to B., I will pay you a specified sum to build and deliver to me so many vehicles

of a certain kind. B. accepts the proposition and buys the wood work of C., the iron of D. and the leather trimming of E. If B. does not pay his subcontractors they may, if any ground of attachment exist, commence attachment proceedings against B. and garnishee the money due from A. to B. Their recovery is limited to what A. owes B., when served with garnishee process. A. is in possession of the vehicles, is operating them in his livery business, on his stage line, or on his street or steam railway. He has the benefit of the labor and material furnished by C., D. and E., of the property called into existence by them, as fully as the property owner who has the building constructed by subcontractors and material-men. There is as much reason for making A. pay the whole of what is due C., D. and E., without regard to the state of the account between him and B., as there is in making the property owner pay the claims of the subcontractors and material-men who labored on or furnished material for his house. If the owner by employing the original contractor puts it in his power to defraud material-men and subcontractors, so does A. in employing B. put it in his power to defraud C., D. and E. The danger of collusion between A. and B. is no greater than between the property owner and his original contractor. It is not as great as it would be between B. and C., D. and E., if they knew A. could be made to pay the claims of C., D. and E. without regard to the state of the account between A. and B. Property owners are as a rule no greater rascals than other business men. The policy of the law is to encourage the improvement of real estate, the rearing of homes and business properties. There is the same danger of A. securing to himself without compensation, the benefits of the labor and material furnished by C., D. and E. for the vehicles by means of a low contract with irresponsible and dishonest B, as there is of the property owner securing the fruits

resulting from the contributions of labor and material from subcontractors and material-men, by reason of the property owner's contract with an irresponsible, dishonest contractor. Yet no Court could be found which would hold A absolutely for the sums due C, D and E, regardless of the contract price.

But it has been said, it is not the contract which creates the lien under the statute, but it is the use of the materials and work upon the premises, of putting them into the building, and attaching them to the free-hold, which entitles the party furnishing them to a lien to the extent of their value. But the same reason holds for making A pay C, D and E in full, regardless of his contract price. A's stage line may not have a single vehicle on it, or his street car line or railway line may have no cars on it—may be wholly unproductive, as the property owner's real estate before the existence of a building. The vehicles when delivered become a part of the stage or car line and enhance its value quite as much as the building increases the value of real estate.

If the mechanics' lien law of Ohio is constitutional, the reasoning necessary to sustain it warrants the existence of laws protecting laborers, material-men and subcontractors in all callings to the same extent as those are secured who contribute to the erection of buildings.

Such legislation is paternalism.

> "Such legislation may invade one class of rights today and another tomorrow, and if it can be sanctioned under the constitution, while far removed in time, we shall not be far away, in practical statesmanship, from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental

functions. Such governmental interferences disturb the normal adjustments of the social fabric and usually derange the delicate and complicated machinery of industry, and cause a score of ills while attempting the removal of one."

In re Jacobs, 98 N. Y., 98, 114.
50 Am. Rep., 636, 647.

In *Henry* v. *Rice*, 18 Mo. App., 497, it was contended that the owner of the property is not injured when more material or labor goes into his building than he contracted for, as he gets the benefit of the property and the enhanced value of it. On page 512 the argument is answered in the following language:

Benefitti owner's erty doe obligate to pay.

> "To my mind there is one irrefutable answer to this suggestion: The dominion of the citizen over his private property should be held supreme. It is this sense that makes him independent and self assertive. It is the rich soil in which a free government strikes deep its roots. For its protection society exists. For its maintenance laws should be made and Courts established. Private property cannot be taken for private use against the consent of the owner, with or without compensation. No man has the right to go to the citizen unbidden and say: 'I will confer a benefit on you by improving your property and enhancing its value, but you must pay me for the office, or I will take your property away from you.' The owner may be able and willing to have erected on his lot of ground a house worth five thousand dollars, but if one costing ten thousand dollars be placed there, he is unable to pay for it. If a lien be enforced against it for the ten thousand dollars, he may lose his house and the lot, and thus be made homeless."

We close the discussion on this point by quoting an Ohio case—the underlying principle of which is deeply imbedded in the law and pervades all the decisions made in that State on the subject of mechanics' liens. The rule which was announced in *Hampson et al.* v. *The State*, 8 O., 321, 322, more than sixty-one years ago, and to which no exceptions

have been made, disposes of the argument that the property owner should pay regardless of the contract price because his property has been benefited, and ought, we think, to be adopted and followed by the Federal Courts. HITCHCOCK, J., said:

> "A contracts with B to build for him a house of specified dimensions, and for a specified price. B contracts with C to do the whole or a part of the work, likewise at a specified price, and at a price less than that which he himself is to receive from A as the work progresses. A, from time to time, makes payments to B, according to his contract, and when the work is completed, pays him off in full. Afterward it is found, however, that B has not fully paid C who has done the work, or a part of it, and C files his bill, or commences his action against A, claiming payment from him for his labor, on the ground that 'the laborer is worthy of his hire,' and that A has been benefited by his (C's) labor. True, when he performed his labor, he did it, not for, or on, the credit of A. With him he had no contract; his contract is with B, and so far as he has received payment, it has been from the hands of B. But still, inasmuch as the house, when completed, is the house of A, and is of some benefit to him, he insists that, although A has once paid for this house, he shall pay for it again. What Court would, for a moment, entertain such a claim? What lawyer would commence such a suit?"

THIS COURT SHOULD FOLLOW THE DECISION OF THE SUPREME COURT OF OHIO IN PALMER and CRAWFORD vs. TINGLE, AND YOUNG vs. HARDWARE CO., 55 O. S., 423.

Undoubtedly, the United States Courts had, and have, jurisdiction of this cause. It is a cause in which the State constitutional and statutory law of Ohio should be applied to a controversy about mechanics' liens; the State courts are the final adjudicators of questions touching the interpretation of that law; and our contention is that the United States

courts were, and are, required to administer that law, in this cause, just as the State courts would do it.

The United States courts had, and have, jurisdiction, not because of the subject matter of the controversy, but only because of the character of the parties.

There would be no harmony and no uniformity in the operation of State laws, if the United States courts should refuse to abide by the decision of the State courts upon such a question as is here agitated.

The question raised in this cause is not controlled by the Constitution, laws or treaties of the United States; nor is it a question of general law or commercial law, such as negotiable paper, insurance, and the like; nor is it a question to be controlled by principles of general jurisprudence, of national or universal application.

The question which the Supreme Court of Ohio decided in Palmer & Crawford v. Tingle, and Young v. Hardware Company, *supra*, was purely one of State constitutional and local law.

Guaranty State Constitution.

The constitution of the State, by its bill of rights, guaranteed to every citizen of the State the right to enjoy liberty and to acquire, possess and protect property. By a number of decisions of commanding authority, it has been adjudged that the right to make contracts is embraced in this constitutional guaranty; for one of the modes of acquiring property is by and through contracts.

Cases cited in a preceding subdivision of this brief, illustrate the truth of this proposition. (See page 21 *et seq.*)

The principle that a person has a right to make his own contracts is likewise one that savors of natural justice, anterior to all written constitutions. Judicial judgments which limit the operation of such a principle of natural justice ought to be expressed in the most definite and unmistakable terms, even in the absence of a constitutional restraint.

The law can create contracts for a person in only a small number of instances. It may be done where a duty is *cast* by statute, or equity, or good conscience, or in any way by the law, upon a person. It may be done where one has been benefited by another who is discharging such a duty, and where one has knowingly accepted something of value from another. In these instances, and only in these instances, can the law make a contract for a person.

The Ohio Legislature enacted a mechanics' lien statute, which, separated from its parts irrelevant to this discussion, conferred upon one who had done work upon, or furnished materials for, a building, pursuant to a contract with another, who had contracted with the owner to erect it, a lien for the price of his work and materials, upon the building and land. The statute bestowed that right upon him, not only when the owner had not given his consent to it, but also when he had no knowledge whatever of it. The statute does not limit the right to the lien to an instance when the owner stood by and saw and knew that the subcontractor was doing the work or furnishing the material.

The theory that the owner makes the head contractor his agent by making a contract with him for the erection of a building—an agent invested with irrevocable power—carries the doctrine or fiction of construction to an unreasonable and unjust limit. As a mode of constructing contracts for persons without their consent or knowledge, it is as bad as the English doctrine of constructive treason; it exemplifies how easy even judges are misled by fictions.

The Ohio Supreme Court, after mature deliberation, in the case cited, adjudged that this statute was an invasion and violation of the constitutional guaranty of the right to acquire and possess property and make contracts. The Court did not place its decision on the ground that the statute was unjust, burdensome, inequitable, or contrary to

economic principles, but on the ground that it contravened a constitutional right, created by the State constitution.

The question whether the statute had violated the constitutional guaranty was a local question. It cannot be tortured into a question of general law, or of general jurisprudence, of national or universal application. It is true that other constitutions have the same guaranty in their bill of rights.

It is equally true that not a case has been, or can be, cited, in which any other Court, either State or National, has placed a different construction from that of the Ohio Supreme Court, upon the same, the identical, constitutional guaranty.

No case ought to be a controlling authority in the present controversy as to the construction of the provision in the Ohio bill of rights, unless the facts were substantially identical with those before the Ohio Supreme Court; that is, unless the constitutional provision construed was identical with the one that was before the Supreme Court of Ohio for interpretation.

The decision of the Ohio Supreme Court was rendered before this case was instituted by Jones and Laughlins, and before the answer and cross-bill of Sosman and Landis was filed. It was rendered before any United States Court was called upon to decide the same question, which it decided.

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It is conceded that this Court has decided that the United States courts are not obliged to conform their decisions to the last decision of the State court, when contracts have been made and rights have accrued thereon, on the faith of a prior contrary adjudication of the same State court. But there is no such element in the case at bar. The Circuit Court of Appeals, from whose judgment and decree we have here appealed, conceded that the contracts of Jones and Laughlins, and Sosman and Landis, with McClain, did not belong to that category of contracts. (See 87 Fed. Rep., 674).

Contracts made on t faith of a contrary decision.

Judge Lurton's opinion on this subject is explicit. He says: "There has, therefore, been no such change of opinion by the Supreme Court of Ohio as to bring into operation the rule that the rights of the parties are to be determined according to law as it had been judicially declared when the contract was made."

We have argued in another subdivision of this brief, that not only was there "no particular state of decisions" of the Ohio Supreme Court to mislead them, but also, that the inevitable course and trend of its previous decisions was such that it should have been a warning to them that their lien would not be sustained as legal.

It is also conceded that this Court has decided, that when the State courts have not yet interpreted a State law, and contracts and transactions have been entered into by, and rights have accrued thereon to, non-residents, the United States courts may adopt their own interpretation and are not obliged to imitate a decision of the State courts rendered after such rights have accrued. But even in such an instance, this Court has further declared that it is the duty of the Federal Court to incline, "to lean," to an agreement with the subsequent decision of the State court, unless such a course would operate as an absolute denial of justice. Neither the Bill of Complaint of Jones and Laughlins, nor the Answer and Cross-bill of Sosman and Landis, discloses that there would be an absolute denial of justice to them, if the United States courts should follow the decision of the Supreme Court.

But there is another consideration. The contracts entered into by Jones and Laughlins, and Sosman and Landis, with McClain, were *not* made in the absence of previous decisions rendered by the Ohio Courts. Before those contracts were made, the highest Court of the State rendered several decisions which should have admonished them that their liens would not be valid. They were decisions which fore-

shadowed that the State Supreme Court would pronounce such a statute, as that under which they now seek to shelter themselves, to be unconstitutional, if it should prove loyal to its previous judicial utterances on similar or cognate questions. We do not mean by this that the Ohio Supreme Court had previously construed statutes exactly like this one. We are not obliged to prove such a condition of the law in order to make it manifest that the Ohio Supreme Court had, by a "course of decisions" established a rule of action "which it would be wrong to disturb." It is enough if the history of its decisions reveals that it rendered such decisions on similar laws, statutes, or questions.

In another sub-division of this brief, on pages 9 *et seq*, we have discussed those cases, and we refer the Court to that discussion.

It is only necessary now to remind this Court that, as early as 1838, in *Hampson and Parkison* v. *State of Ohio*, 8 O. 315, the Ohio Supreme Court declared in words of no uncertain sound, that to compel an owner of property who had erected a building upon it, to pay the contract price, first to the contractor, second, to pay it over again to the "subcontractors," and third, to pay it over again to the "manual operatives," would not subserve "the ends of justice." And yet, that is exactly what this statute, now under consideration, in this case at bar, would compel the owner of a building to do.

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By several prior mechanics' lien statutes, and by a number of decisions of the Ohio Supreme Court, which we have before cited, the subcontractors were compelled to acquire their liens in subordination to the contract between the owner and chief contractor; they were also assimilated to attaching creditors; they were also required to know what were the terms and conditions of the contract between the owner and chief contractor; and their liens were confined to the derivative class.

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This history of the law-making and law-expounding on the subject of subcontractors' liens, should have admonished Jones and Laughlins, and Sosman and Landis, that such a statute as the one under consideration would not receive the approval of the Supreme Court of Ohio, and that it was unconstitutional.

Relevant to the question whether this Court should follow the decision of the Ohio Supreme Court, we invite attention to the last cases decided.

The last decision of this Honorable Court, prior to the writing of this brief, was rendered in *Hartford Fire Insurance Company* v. *Chicago and Milwaukee Ry. Company*, 20 Sup. Ct. Rep., 33. The second paragraph of the syllabus reads: "Questions of public policy as affecting the liability for acts done, or upon contracts made and to be performed within one of the States of the Union, when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law, or of general jurisprudence, of national and universal application, are governed by the law of the State as expressed in its own Constitution and statutes, or declared by its highest court."

The State court had decided that a contract exempting a railroad company from liability for negligence was not against public policy; and this Court resolved that that decision was binding upon the United States Court sitting in that State. The State court decided the question twice; the first time it decided it in another case, between other parties, and the decision was that the contract was void. That decision was rendered after the agreement passed on by the United States Circuit Court was made; afterwards there was a rehearing granted and the Iowa Supreme Court reversed its former decision. A petition for a second rehearing was dismissed. The case in the United States Circuit Court was pending at

the time the other case was pending in the Supreme Court of Iowa. This Court concluded that the United States Circuit Court did right in following the last decision, instead of the first one.

This decision is decisive; it settles the controverted question in our favor; there can be no possible escape from it. Its identity on principle with this case is clear and certain on a comparison of the two conditions of fact.

A question touching the validity of a mechanics' lien is just as much a local question as a question in regard to the validity of a contract exempting a railroad company from liability for negligence. There are mechanics' lien statutes in every State, it is true; it is equally true that negligence is committed by railroad companies in every State, and that contracts exempting them from liability are made in every State.

Again, we invite the Court's attention to a case recently decided, in which the opinion was delivered by a member of this Court, Justice Harlan (O'Brien v. Wheelock, 95 Fed. Rep., 883.) The question in that case related to the validity of a drain and ditch statute, and of assessments for the purpose of constructing such a drain and ditch.

In the first paragraph of the syllabus the Circuit Court of Appeals expressed itself in this significant language:

> "While the Federal Courts in causes in their jurisdiction involving rights arising under State statutes which had not at the time received any authoritative construction by the State Courts, or the validity of which had not been adjudicated, are not bound to follow a subsequent State decision as to such construction or validity, yet, in exercising its independent judgment thereon a Federal Court should give effect to rules of construction which had previously been established by the highest court of the State, and should also lean towards an agreement of views with the State Court, and not act upon a different view, unless compelled to do so to prevent an absolute denial of justice."

It was contended in that case that, as the bonds in question were issued before the State Supreme Court had rendered any decisions, it was both the province and duty of the Federal Court to determine for itself the constitutionality of the Illinois statute, and that it should exercise its independent judgment, no matter what may have been the views expressed by the highest court of Illinois upon that question, and *Burgess* v. *Seligman*, *supra*, was cited. After quoting from that case, and after conceding that the Federal Court might exercise its independent judgment, Justice HARLAN observed: "But in doing this there are two principles that should not be overlooked: (1.) That, although that act of 1871 may not have been expressly the subject of judicial construction before the rights of the plaintiff accrued, this Court should give effect *to any rules of construction that may have been previously established by the highest Court of the State when interpreting similar provisions in the Constitution of* 1848; (2.) That the Federal Courts, for the sake of harmony, and to avoid confusion, should lean towards an agreement of views with the State Courts, if the question seems to them balanced with doubt, and endeavor to avoid any unseemly conflict with the well considered decisions of the State Courts upon questions of local law."

Our opponents will, doubtless, place much reliance upon the decisions of this Court in *Burgess* v. *Seligman*, 107 U. S., 20, and *Pleasant Township* v. *Ætna Life Insurance Company*, 138 U. S., 67, which, for one purpose, we have already discussed. But we submit that these decisions do not sustain them.

The Supreme Court of Missouri did not render its decision until after the United States Circuit Court determined *Burgess* v. *Seligman*. (Page 32 and 33, 107 U. S.) The Supreme Court of Ohio decided *Young* v. *Hardware Company*,

before the case, now being argued before this Court, was instituted.

The decision in *Burgess* v. *Seligman*, must be interpreted and limited by the facts in the case.

True, the transaction between the parties to *Burgess* v. *Seligman*, occurred before there was any settled construction of the statute of Missouri; but this Court did not place any stress upon that fact; the fact that the United States Circuit Court rendered its decision before the State Court passed upon "the identical transactions" was the relevant master fact.

Nor was the diverse state citizenship of the two parties commented upon at all.

Why should there be a different rule for a case in which the parties are not citizens of the same state, and a case in which the parties are citizens of different states?

In a different kind of case, but in deciding whether the State Court should be followed, this Court answered our question by saying: "It would be unfortunate, to say the least, to have this conveyance sustained as to home creditors and avoided as to foreign."

Jencks v. *Quidwick Co.*, 135 U. S., 457.

The gist of the decision in *Burgess* v. *Seligman*, is contained in this statement: "And when the contracts and transaction have been entered into and rights have accrued thereon, under a particular state of decisions of the State tribunals, or when there has been no decision, the Courts of the United States assert the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be given by the State Courts after such rights have accrued." The dimensions of this decision cannot be extended beyond the plain meaning of these words.

Our opponents will probably endeavor to enlist *Olcott* v. *Supervisors* (16 Wall., 687), for support of their view that the question decided in *Young* v. *Hardware Company*, was neither a local question, nor one respecting the construction of the Ohio Constitution. A careful analysis of that case, however, will make it obvious that the decision does not help them. We have already commented on that case, but it is necessary to the clearness of our view to notice it again. This Court concluded, in that case, that the Supreme Court of Wisconsin, in *Whiting* v. *Fond Du Lac County*, did not decide either a local question or one of interpretation or construction. Why? Because the question which was decided was in regard to the nature of taxation, what uses were public and what were private, and the extent of unrestricted legislative power. The decision of that question did not, of course, involve, or require, an ascertainment of the meaning of any constitutional provision, as this Court declared; nor did the Supreme Court of Wisconsin purport to determine the meaning of any constitutional enactment.

But that case cannot, on logical principles, be assimilated to the case under discussion. In Young v. Hardware Company the Supreme Court did decide a question of interpretation and construction. That Court distinctly avowed that the statute creating the lien in favor of the sub-contractors was an infringement upon the constitutional guaranty of the right to acquire and possess property. This conclusion was not based upon some invisible constitutional spirit or purpose; but the particular provision of the Constitution violated was specified. The Court attached a meaning to that particular provision; it was interpreted; it was construed by the Court.

The fact that other State constitutions contain similar, or identical provisions, does not withdraw the question which the Court decided from the category of constitutional or local questions.

Two different State constitutions of the States of A and and B, may contain exactly the same provisions; the language of each may be identical. The Supreme Court of A may fasten one construction on it; the Supreme Court of B may construe it as meaning something else radically different. Both decisions, we will suppose, were rendered before the Supreme Court of the United States was called upon to decide the same question in A State. Would the latter Court follow the adjudication of A's Supreme Court, or of B's Supreme Court?

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In *Jencks* v. *Quidnick Co.*, 135 U. S., 457, this Court expressed its conclusion on this question by observing:

> "So, when the highest Court of a State affirms that a conveyance made by a debtor to a trustee for the benefit of creditors is valid under the statutes of that State, we should ordinarily in any case involving the validity of such conveyance, follow that ruling, *even though that statute was common to many States, and in others a different ruling had obtained.*"

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This decision would furnish us, too, a decisive answer to the argument of the other side based on the decisions of other State Courts sustaining mechanics' lien statutes, even if they could show that these other Courts were engaged in construing a constitutional provision just like the one construed by the Ohio Supreme Court.

Had the Supreme Courts of other States in rendering those decisions reached a conclusion antagonistic to that of the Ohio Supreme Court as to the meaning of a similar constitutional provision (which they did not do), this Court, true to its precedents and to principle, would have followed the Ohio Supreme Court. The case just cited vindicates the soundness of this statement.

Circuit C Ohio dec mechani law in fa subcontr unconsti tional.

The case of *Palmer & Crawford* v. *Tingle*, *supra*, was decided by the Circuit Court of the Third Circuit of Ohio, in November, 1895, the resolution of the Court being that the

mechanics' lien law in favor of the subcontractors, was unconstitutional. (9 Ohio Circuit Court Reports, 708.) The Circuit Court is an intermediate appellate court. It occupies the same position in our judicial system which is occupied by the Supreme Court in the New York judicial system.

"Exhibit B," attached to the Bill of Complaint of Jones and Laughlins (pages 9 and 10 and the "Transcript of Record"), shows that part of the materials furnished by them to McClain were delivered after that decision was made; and that the value of the materials so delivered amounts to the sum of $1,997.08.

"Exhibit B," attached to the Answer and Cross-bill of Sosman & Landis (pages 22, 23, 24 and 25 of the "Transcript of Record"), discloses that *all* the materials which they agreed to furnish to McClain, and for which they claim they have a mechanics' lien on the hotel building, were delivered and furnished by them *after the decision was rendered by the Circuit Court in Palmer & Crawford* v. *Tingle*, *supra*.

At the time, therefore, when Jones & Laughlins delivered $1,997.08 of the materials, and when Sosman & Landis delivered *all* the materials, which they were required to furnish under their written contracts with McClain, the mechanics' lien law in favor of subcontractors had been, by this intermediate appellate court, declared unconstitutional and void. True, they made their contracts with McClain before this decision was rendered. But is that enough? According to the decision in *Burgess* v. *Seligman*, *supra*, it was not sufficient that "contracts" and "transactions" had "been entered into," "when there had been no decision of the State Court;" the rights of the parties must, also, have "accrued thereon;" that is, on the contracts and transactions, *at that time*.

The evidence of "Exhibit B," attached to Sosman and Landis' answer and cross-bill, shows that they did not deliver a single article of the materials sold, and to be furnished by them, to McClain, till in December, 1895—*after the decision of the Circuit Court was rendered.*

Their lien did not begin till that time.

Section 3185, Revised Statutes;

Choteau et al. v. *Thompson and Campbell*, 2 O. S., 114.

Therefore, at the time they acquired their lien, the lien law for the benefit of them, for the benefit of subcontractors, had been adjudged, by said Circuit Court, void and unconstitutional.

REVIEW OF CASES CITED BY OPPOSING COUNSEL IN THE CIRCUIT COURT OF APPEALS.

It was claimed below, regarding the mechanics' lien laws similar to that of Ohio, that the Supreme Court of over twenty States have passed upon them. An analysis of cases passed upon by the several States, demonstrates that in many instances the constitutionality of the law has not been questioned, and that in many cases where the law was sustained, many of the objections raised herein were not before the Court.

The 38 O. S., 122, and 42 O. S., 251, are not in point as claimed by plaintiffs' counsel, because the constitutionality of the lien law was not in question, and the law then in force required notice to the property owner. The constitutionality of the law was in both cases assumed by both parties. The Courts will not pass on the constitutionality of a law unless the question be raised in the pleadings.

John Spry Lumber Co. v. *Sault Savings Bank & Trust Co.*, 77 Mich., 199.

Cooley's Constitutional Limitations (5th Ed.), Sec. 163.

As stated by Judge SAGE, the 38 O. S., and 42 O. S., cases were not decided under the present law which is an amendment of the lien law theretofore existing. The present case arises under an amendment of the law and not a change of decision. The point attempted to be made by appellant's counsel on the two above Ohio cases is fully answered by Judge SAGE in his opinion, to which reference is made. It should be noted that the doctrine that the claim of the subcontractor against the owner is limited to the amount due on the contract at the time he delivers his attested account against the contractor for work and material furnished, had been announced as the law of Ohio, as in the *Dun Case*, 27 O. S., 132, long prior to the 38th and 42nd Ohio State cases, and such doctrine has been continuously held by the Ohio Court to the present time.

In *Winder* v. *Caldwell*, 14 How., 444, and *Purinton* v. *The Hull of a New Ship*, 2 Curtis, 416, the constitutionality of the law was not questioned. They were, as stated by Judge SAGE, decided on other points.

In the 14 Nev., 32; 15 Nev., 58; 2 Mon., 115; 63 Ind., 17, 20; 45 Ind., 96; 80 Va., 821; 81 Va., 125; 162 Mass., 592; *Treusch & O'Connor* v. *Shyrock*, 51 Md., 162, and *Brooks* v. *Railway Co.*, 101 U. S., 446, the question of the constitutionality of the law under consideration was not considered. The issue was not raised in the pleadings. The Nevada and Maryland laws required notice to the property owner before his property could be subjected to a lien.

We have no quarrel with the doctrine of *Blauvelt* v. *Woodworth*, 31 N. Y., 285. We do not dispute the validity of any mechanics' lien law which gives the subcontractor and material-man a lien to the extent of the fund still due the original contractor from the owner, and that is all the New York statute gives. As PORTER, J., said in the above case, (p. 286), "The mechanic * * * has a specified statutory

lien *to a limited extent.*" It is where the mechanic, material-man and subcontractor asserts a lien by reason of a statute irrespective of the account between the owner and original contractor, that we deny the constitutionality of the law. We concede that a constitutional law enters into and forms a part of the original contract. *Glacius* v. *Black*, 67 N. Y., 567, did not arise on a law like that of Ohio, and simply announces the validity of the particular law then before the Court.

An examination of the case of *Hicks* v. *Murray*, 43 Cal., 515, and of the California law under which the case arose, clearly distinguishes it from the case at bar. The California owner was given an opportunity to notify the subcontractors that he would not be responsible for labor and material, and thereupon, such notice being given within three days after knowledge of the progress of the improvement reached the owner, he and his property were relieved from liability. Besides the lien attached to the building only, and the entire estate could not be taken. This is our understanding of the California law as it then stood. This view is corroborated by *Renton* v. *Conley*, 49 Cal., 187, in which a law similar to that of Ohio was held invalid. In other words, the doctrine in California is the same as in New York.

In *White* v. *Miller*, 18 Pa. St., 52, the constitutionality of the Mechanics' Lien Law was not called in question, and that case is therefore not authority on the matter involved herein. The agreed statement of facts did not present the issue raised in this case. In so far that the Court held that the owner was bound to see that the original contractor applied the money paid him by the owner in satisfaction of the material-mens' claims, the decision is in our judgment not sound. Supineness is inexcusable on the part of the material-man as well as on the part of the property owner. The material-man can not lawfully be relieved from the

caution, care and prudence which men are required to exercise in every other avocation. The doctrine of that case pushed to its legitimate results, strips the property owner of the liberty of contract.

The decision in *Laird* v. *Moonan*, 32 Minn., 358, is subject to all the objections we have heretofore urged against the constitutionality of the Ohio law. It should also be borne in mind that the Minnesota law authorizes a bond to be approved by the District Judge and by compliance with that statutory provision, the owner and his property is relieved from liens. We direct attention to this fact not because it relieves the Minnesota law from the charge of unconstitutionality as class legislation and as interfering with the right to contract, but because the Minnesota law attempts to furnish some means of protection to the property owner.

The cases of *O'Neil* v. *St. Olaf's School*, 26 Minn., 329; *Bohn* v. *McCarthy*, 29 Minn., 23, and *Laird* v. *Moonan*, 32 Minn., 358, were all decided before the case of *Meyer* v. *Berlandi*, 39 Minn., 438, and we submit that they are not in harmony with the last named case. The Meyer case was followed in the 106 Ala., 501, which held a law similar to the Minnesota law and involving the principle of the Ohio law, unconstitutional.

Taylor v. *Murphy*, 148 Pa. St., 337, is not so late an announcement of the law by the Supreme Court of Pennsylvania, as is found in *Waters* v. *Wolf*, 162 Pa. St., 153, wherein the principle involved in the Ohio law is held unconstitutional.

Provident Institution v. *Jersey City*, 113 U. S., 516, did not involve a mechanics' lien law. The same is true of *Davis* v. *State*, 3 Lea (Tenn.), 380.

This last named case simply announces a general principle without reference to any particular mechanics' lien law.

In *Gurney* v. *Walsham*, 16 R. I., 698, it appears from the decision that the Rhode Island law required notice to be given to the property owner before a lien could be taken, a provision not found in the Ohio law. The notice required by the Rhode Island law was a condition precedent to the taking of the lien. In that case, while the Court held that the law became a part of the contract, and did not impair the obligation of contracts, there was no discussion of the consequence resulting to the property owner from the operation of such a law, nor does the unconstitutionality of the law appear to have been seriously discussed. The reasoning of the Court on the point that the law enters into and becomes a part of the contract is unsound except as applied to constitutional laws.

An examination of *Reeves* v. *Henderson*, 90 Tenn., 521, reveals the fact that under the Tennessee law notice is essential to the acquiring of a lien. The constitutionality of the law was not discussed in that case, but the decision rested wholly on *Cole Mfg. Co.* v. *Falls*, 90 Tenn., 466. By reference to the last named case it appears that the property owner may require a bond by virtue of a statutory provision, and in event that the property owner is required to pay more than the contract price he may, on motion, obtain judgment against the original contractor and his bondsmen.

It will further appear that the principle of the Tennessee law had been in active operation in that State without dispute since the year 1845 (p. 475, 90 Tenn.)

Henry V. Coatsworth Co. v. *Evans*, 97 Mo., 47, is a case in which many of the objections interposed in this case were not before the Court. The Missouri law requires notice to the property owner before a lien can be acquired. The case is easily distinguished from the case at bar.

In *Paine* v. *Tillinghast*, 52 Conn., 532, the facts are so radically different from the case at bar that the Connecticut

case is no authority. In that case the liens were asserted by parties who dealt directly with the duly authorized agent of the property owner. That agent was not the original contractor but a relative of the property owner. The parties asserting liens had over them no original contractor. They were in fact themselves original contractors. The question of the constitutionality of the law was not under consideration. The question was one of agency.

In *Spokane Manufacturing and Lumber Co.* v. *McChesney*, 1 Wash., 609, the law was declared constitutional because it does not impair the obligation of existing contracts. The Court will observe that the constitutionality of the law was not discussed, except in so far as it affects the right of contract, and that the discussion did not even on that point take the wide scope that is found in the case at bar. It is not, we submit, a well considered case.

In *Merrigan* v. *English*, 9 Montana, 113, the only constitutional objection interposed was that the law interfered with the right of contract. It does not appear to have been fully discussed.

An examination of the other cases cited by counsel in their brief, discloses the fact that rarely has there been a full discussion of the points involved in this case.

It will further be found in a number of the cases where the law has been held valid, that the Courts have apologized for the law, have questioned the wisdom and propriety of such enactments, and have not considered the law on principle, but have simply followed the decisions made elsewhere, in which the constitutional questions were not raised.

For instance in *Wright* v. *Pohls*, 83 Wis., 560, the Supreme Court of that State while following its earlier decisions sustaining a law similar to the Ohio law of 1894, "appreciated the ethical objection thereto," and conceded that the Wisconsin law "is a harsh one, and will frequently operate

unjustly against owners who improve real estate," and that "its tendency must necessarily be to discourage improvements, and it would seem that by its enactment the legislature has established an objectionable public policy."

So in *Mallory* v. *LaCrosse Abattoir Co.*, 80 Wis., 175, it was said: "The theory of the law giving to laborers and material-men specific liens upon the property upon which their labor was performed or their materials used, seems to be that, because the value of such property has been enhanced thereby, it is just that the property should be specifically charged with the sums expended thereon. * * But when these restrictions for the protection of the owner were swept away, and his property subjected to a lien charge for the amount of any claim of a subcontractor against the principal contractor for labor or material used in the building or improvement, without regard to the state of the account between such principal contractor and the owner, it must be conceded that there is much room to question the reasonableness and justice of the statute which thus adds to the responsibility of the owner."

A more courageous Court would have held, as does Phillips on Mechanics' Liens, Sec. 65, that "A fundamental principle underlying the ownership of property is the right of possession and enjoyment to be disturbed only by the voluntary act of the owner. The lien of a mechanic being a remedy by which the property of one man may be taken for the benefit of another, it necessarily follows that it can only rise by the free consent of him to whom it belongs;" for "The right to contract necessarily includes the right to fix the price at which labor will be performed and the mode and time of payment; and a statute which restricts a person as to either of these essential elements of the right to contract to a mode different from that enjoyed by the community at large deprives him of liberty and property without

'due process of law.'" *Law* v. *Rees Printing Co.*, 41 Neb., 127; 43 Am. St., 670.

The decision rendered by the Supreme Court of Michigan in *Sprey Lumber Company* v. *Sault Ste. Marie Savings Bank*, *supra*, which is in unison with the Ohio Supreme Court decision in *Young* v. *Hardware Company*, and which we have already discussed to some extent, is not enfeebled by the fact that the Court did not particularize any constitutional provision that was violated by the lien statute of that State. The Court explained why that was not necessary. It affirmed this of the statute: "Such a gross perversion of all the essential rights of property is so plain that no explanation can make it plainer."

And the Court expressed in no unmistakable language the abhorrent character of such legislation as that which the Court is now to consider, in this case at bar. It said: "There is no constitutional way for divesting a man's title" (to property) "except by his own act, or default. Here his own act is not required, and his freedom from default is no defense."

The other side will rely upon the decision in *M. F. G. Co.* v. *Falls*, 90 Tenn., 466, which we have before analyzed. But we repeat that there was no discussion, either by the attorneys or by the Court, of the constitutional question involved in the case at bar. The Court did determine that the statute of Tennessee did not contravene the constitutional restraint against taking property without due process of law, or the law of the land. Whether the statute contravened the constitutional right to acquire, possess and dispose of property, or the right to make contracts, was neither agitated, discussed nor determined.

The same answer may be appropriately made to the citation of the case of *Colter* v. *Frese*, 45 Ind., 96. The opinion in that case *was* a learned and able one, but it did not touch

a constitutional question. The question might have been raised in that case, but the decision is entitled to no consideration in the solution of the question made in the case at bar, because the Supreme Court of Indiana did not even think of such a question.

The decision in *Stewart* v. *Wright*, 52 Iowa, 335, is no precedent for the other side. We have presented one interpretation of this decision. To meet the contingency that that view would not be sound, we discuss it, now, from another standpoint. No constitutional question was, in terms, discussed or decided. The Court said the owner of the property, against which the mechanics' lien was sought to be enforced, was protected in making payment before notice of the subcontractor's claim, and that the latter could only enforce his lien "in subordination to the original contract." The Court further said that the statute did not prescribe the character of the contracts to be made. This case cannot be a precedent for a proposition that was neither consciously nor unconsciously in the mind of the Court.

It is true that, in *Hicks* v. *Murray*, 43 Cal., 515, the constitutionality of the mechanics' lien statute of that State was challenged; but the Court, without any argument at all, or giving any reason therefor, or for omitting discussion, decided that it was constitutional. Judge DILLON has somewhere said: "Even judicial judgments, if unaccompanied by the reasons on which they rest and which give to them their real worth, would have no recognized standing—and ought to have none—in professional estimation and regard."

The case of *Spofford* v. *True*, 33 Me., 283, has been frequently cited in the books and in this case; it has already been noticed in this brief. But we ask the Court's further attention to the case. The facts were briefly these: Land was conveyed by A. to B., upon a condition that the conveyance should be void, if payment of the purchase money

should not be made; the grant also reserved towards the payment of the price, a lien of $5.00 upon each 1,000 feet of lumber which should be taken from the land, and authorized the lumber to be cut subject to this lien. B. contracted with H. & Co. to cut, haul and drive to the boom logs at stipulated prices; H. & Co. hired laborers to cut and haul the timber. These laborers acquired liens on the logs under the mechanics' lien statute of the State, which, the Supreme Court held, were superior to the lien of A. There is certainly no parallel between that case and the case at bar; the facts in that case made an entirely different question for solution by the Supreme Court of Maine.

In *Gurney* v. *Walsham*, 16 R. I., 699, a case which we have already, in this brief, noticed, the only constitutional question was, whether the mechanics' lien law of Rhode Island impaired the obligation of contracts; and the Court disposed of the question in two short sentences. The decision does not appear to have been the result of thorough investigation.

The case of *Paine* v. *Tillinghort*, 52 Conn., 632, we have already analyzed. It was a case where the owner of the property made his brother an express agent to build a house upon his property; the brother did not disclose to the laborers and material-men that he was an agent, or who the principal was. The lienors elected to look to the owner for redress. There was no question of constructive agency discussed or decided; there is not even any analogy between the Connecticut statute and the Ohio statute; for the former gave a lien to parties furnishing material or performing labor at the instance of the owner, "or of some person having authority from, or lawfully acting for, such owner." How the decision in the Connecticut case can support the decision of the Circuit Court of Appeals, we cannot perceive.

On the case of *Roanoke, etc., Co.* v. *Karn*, 80 Va., 589, and *Frensch* v. *Shyrock*, 51 Md., 162, the same criticism may be made that has been made in regard to some of the other cases, namely, that no constitutional question was either raised or discussed. It did happen that the Courts of Virginia and Maryland did decide that the lien statutes of their respective States were valid; but neither Court was called upon to decide the question whether the statutes conflicted with the constitutions of the States, and especially the constitutional provision which guarantees the right to acquire, possess and hold property and make contracts. To make the decisions in these two cases precedents, the Court should have deliberated upon the exact question which this Court is called upon to decide in the case at bar. If there was no deliberation upon such a question, the decisions are no authority, for the proposition in dispute.

Roanok Co. v. K Va., 589 Frensch rock, 51 161, not point.

We respectfully submit that the judgment of the Circuit Court of Appeals should be reversed; but if this Court should conclude that its judgment should be affirmed, then this cause should be remanded to the Circuit Court of the Southern District of Ohio for further proceedings, since the defendant, the Hotel Company, has other defenses which can only be interposed by plea or answer.

Respectfully submitted,

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